

January 1980

Women and Welfare: The Cycle of Female Poverty

Andra M. Pearldaughter

Vivian Schneider

Follow this and additional works at: <http://digitalcommons.law.ggu.edu/ggulrev>



Part of the [Family Law Commons](#)

Recommended Citation

Andra M. Pearldaughter and Vivian Schneider, *Women and Welfare: The Cycle of Female Poverty*, 10 Golden Gate U. L. Rev. (1980).
<http://digitalcommons.law.ggu.edu/ggulrev/vol10/iss3/5>

This Article is brought to you for free and open access by the Academic Journals at GGU Law Digital Commons. It has been accepted for inclusion in Golden Gate University Law Review by an authorized administrator of GGU Law Digital Commons. For more information, please contact jfischer@ggu.edu.

WOMEN AND WELFARE: THE CYCLE OF FEMALE POVERTY

Andra M. Pearldaughter* and Vivian Schneider**

Women are second class economic citizens whether they choose to work in the home or in the market place. A number of significant factors relegate homemakers to this status. First, although homemakers have a legal right to support and maintenance from their spouses, this right is practically unenforceable.¹ Second, homemakers are economically vulnerable to divorce and widowhood, particularly in their midyears; either event may leave them with few assets, little cash, no marketable skills, and no source of income.² Finally, homemakers cannot acquire Social Security or pension coverage in their own right, but only as their husbands' dependents, and as dependents, their ability to obtain or control coverage is severely limited.³

Women who enter the labor market fare little better despite the ostensible economic recognition their work receives. Sex discrimination in the workplace, including sex-segregated jobs and undervaluation of woman's labor,⁴ traps women in wage poverty. Women's wages continue to fall behind those of men, and women receive fewer valuable fringe benefits, such as health insurance.⁵ Remedial legislation has ineffectually addressed these problems.⁶ Moreover, discrimination against women workers continues into their retirement because low wages mean low Social Security and pension benefits.⁷

Because of their poverty, women are disproportionately rep-

* J.D., Golden Gate University School of Law, 1977. Ms. Pearldaughter is in private practice in San Francisco, specializing in employment law. The authors thank the staff of the Older Women's League Educational Fund for support and assistance in the preparation of this article.

** Second Year Student, Golden Gate University School of Law.

1. See notes 19-22 *infra* and accompanying text.

2. See notes 96-108 *infra* and accompanying text.

3. See notes 154-157 *infra* and accompanying text.

4. See notes 42-69 *infra* and accompanying text.

5. See notes 44-57 *infra* and accompanying text.

6. See notes 58-69 *infra* and accompanying text.

7. See notes 165-183 *infra* and accompanying text.

resented among welfare recipients. Women comprise 87.3% of adult Aid for Families with Dependent Children (AFDC) recipients,⁸ and seventy-two percent of aged Supplemental Security Income (SSI) recipients.⁹ At first blush, these figures might seem merely the obvious result of childcare responsibility falling predominantly on women, or of women's greater longevity. However, the number and percentage of women who are poor has increased,¹⁰ even though the number and percentage of the gen-

8. In 1975, 87.3% of all families receiving AFDC were eligible because of the father's absence. U.S. BUREAU OF THE CENSUS, DEPT OF COMMERCE, STATISTICAL ABSTRACT OF THE U.S., TABLE No. 569, AID TO FAMILIES WITH DEPENDENT CHILDREN (AFDC)—RECENT DISTRIBUTION OF CHARACTERISTICS OF RECIPIENT FAMILIES AND CHILDREN: 1973 AND 1975, at 361 (1978). See notes 70-84 *infra* and accompanying text for discussion of the AFDC program.

9. OFFICE OF RESEARCH AND STATISTICS, SOCIAL SECURITY ADMINISTRATION, U.S. DEPT OF HEW, SUPPLEMENTAL SECURITY INCOME MONTHLY STATISTICS, Table 3 (1979) (ORS Pub. No. 016). See notes 184-201 *infra* and accompanying text for discussion of the SSI program.

10. In 1936, 26.3% (10,390,000) of those below the poverty level were single women and women heads of households. BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, SERIES P-60, No. 115, CURRENT POPULATION REPORTS, CONSUMER INCOME CHARACTERISTICS OF THE POPULATION BELOW THE POVERTY LEVEL: 1976, at 5, Table B (1978). By 1976, the number of poor single women and women householders had increased to 12,586,000, 50.4% of all people below the poverty level. *Id.* A more graphic picture of the economic status of women can be obtained by examining households ranked by income, and broken down by marital status and sex of head:

Table 1

AGGREGATE HOUSEHOLD INCOME (1976)

	<u>lowest fifth</u>	<u>second fifth</u>	<u>third fifth</u>	<u>fourth fifth</u>	<u>highest fifth</u>
Male head, wife present	26.8%	54.2%	70.6%	82.8%	89.4%
Male head, wife absent	2.1%	2.1%	1.6%	1.1%	.8%
Female head, husband absent	7.9%	3.8%	1.7%	.8%	.3%
Male, widowed	4.4%	2.4%	1.1%	1.0%	.9%
Female, widowed	31.9%	12.4%	6.2%	3.0%	1.9%
Male, divorced	3.0%	2.9%	3.1%	2.8%	2.1%
Female, divorced	9.1%	8.4%	5.6%	2.3%	1.2%
Male, single	6.4%	6.8%	5.5%	3.7%	2.5%
Female, single	8.3%	7.1%	4.6%	2.4%	1.0%

BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, SERIES P-60, No. 109, CURRENT POPULATION REPORTS, HOUSEHOLD MONEY INCOME IN 1976 AND SELECTED SOCIAL AND ECONOMIC CHARACTERISTICS OF HOUSEHOLDS, at 19, Table 4 (1978).

eral population considered impoverished has decreased.¹¹ The increase in female poverty and reliance on welfare is directly attributable to the sexism in our society and the laws which reflect and support it. Despite the preponderance of women living below the poverty level and participating in income assistance programs, the linkages among sexism, poverty, and welfare have seldom been explored.¹²

Welfare programs offer no escape from poverty. The present welfare system merely perpetuates women's dependent and inferior economic status. Homemaking is not recognized as work, and government-sponsored employment training is inadequate and sex-stereotyped.¹³ Through a combination of work requirements and work disincentives women are forced into a cycle of wage and welfare poverty.¹⁴ Until sexism, the root cause of much of this country's poverty, is attacked, welfare rolls will continue to swell.¹⁵ Only economic recognition for homemakers and ade-

From this data, it is clear that married couples have the edge on economic prosperity. However, if something happens to break up the marital unit, women across the board will suffer more dire economic consequences. Additionally, never-married men fare better than never-married women.

11. In 1959, the total number of persons below the poverty level was 39,490,000 (22.4% of the population). BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, SERIES P-60, No. 115, CURRENT POPULATION REPORTS, CONSUMER INCOME CHARACTERISTICS OF THE POPULATION BELOW THE POVERTY LEVEL: 1976, at 5, Table B (1978). By 1976, the total had dropped to 24,975,000 (11.8% of the population). *Id.*

12. Welfare programs have overwhelmingly been analyzed from the important perspective of the role racism plays. See, e.g., J. FEAGIN, SUBORDINATING THE POOR (1975); L. KOMISAR, DOWN AND OUT IN THE USA (2d ed. 1977); R. PIVENS & F. CLOWARD, REGULATING THE POOR (1970); W. TRATTNER, FROM POOR LAW TO WELFARE STATE (1979); D. TUSING, POVERTY IN A DUAL ECONOMY (1975).

13. See notes 85-95 *infra* and accompanying text.

14. See notes 42-95 *infra* and accompanying text.

15. Sexism is not the lone cause of poverty. Discrimination on the basis of race, sexual preference, physical disability, or other factors also has a negative economic impact on the affected class of individuals. Further, women subject to any of these forms of discrimination suffer multiple burdens. Race, sexual preference, and physical disability discrimination deserve examination in their own right. See note 12 *supra* for references to materials regarding racism in the context of welfare. For descriptions of the extent and type of discrimination suffered by homosexuals, see COMMUNITY RELATIONS COMMISSION, CITY OF TULSA, OKLAHOMA, SEXUAL PREFERENCE STUDY (1976); DEP'T OF HUMAN RESOURCES, STATE OF OREGON, PRELIMINARY REPORT OF THE TASK FORCE ON SEXUAL PREFERENCE TO THE OREGON STATE LEGISLATURE (1977); GAY COMMUNITY OF CONCERN, ENDING DISCRIMINATION AGAINST LESBIANS AND GAY MEN (1976) (P.O. Box 8265, Stanford, CA. 94305). For a description of employment discrimination against lesbians, see Pearldaughter, *Employment Discrimination Against Lesbians: Municipal Ordinances and Other Remedies*, 8 GOLDEN GATE U.L. REV. 537 (1979). Physical disability discrimination has been discussed in Engebretson, *Administrative Action to End Discrimination*

quately paying jobs for women workers can reverse this trend.

The purpose of this article is to examine welfare as a women's issue which affects women of all ages, whether homemakers, workers, or both. This article will document the economic pitfalls women face at every stage of their lives, and the welfare system's lack of responsiveness to these problems. In short, this article will explore why women are poor and how welfare keeps them poor. The authors hope this effort will initiate a dialogue on the panoply of economic problems women face and the changes required for true welfare reform.

I. YOUNGER WOMEN WITH CHILDREN

A. HOMEMAKERS

Traditionally, society has viewed a woman's primary role as that of wife and mother, an economic dependent.¹⁶ A woman's success has been gauged by her homemaking skills—skills not generally considered transferable to the job market.¹⁷ At the same time, the value of a homemaker's work has been estimated

Based on Handicap: HEW's Section 504 Regulation, 16 HARV. J. LEGIS. 59 (1979); Turner & Factor, *Litigating Employment Discrimination Claims Under the Vocational Rehabilitation Act of 1973: Private Rights of Action and the 1978 Amendments*, 13 CLEARINGHOUSE REV. 87 (1979); Wolff, *Protecting the Disabled Minority: Rights and Remedies Under Sections 503 and 504 of the Rehabilitation Act of 1973*, 22 ST. LOUIS U. L.J. 25 (1978); Note, *Employment Rights of Handicapped Individuals: Statutory and Judicial Parameters*, 20 WM. & MARY L. REV. 291 (1978).

This article purposely focuses on the common experiences all women face because of sex discrimination and the compounding effects of age discrimination. Further research into the problems of women facing multiple burdens of discrimination would greatly benefit the development of feminist theory.

16. Historically, women were the property of men, under the "protection" of a father, husband, son, or brother. V. BULLOUGH, *THE SUBORDINATE SEX* 154 (1973). As dependents, they were generally seen as nonproductive, taking more out of the economic system than they contributed. Rein, *The Strange Case of Public Dependency*, 2 TRANS-ACTION 16, 18 (1965). Following the advent of industrialization, home production became women's primary responsibility, but because homemaking does not produce monetary compensation, it is viewed as valueless. Women as homemakers are not considered workers, but rather dependents or parasites. S. KATTELBAUM, *THE PENSION GAME: THE AMERICAN PENSION SYSTEM FROM THE VIEWPOINT OF THE AVERAGE WOMAN* 4-7 (1978)(report of the Taskforce on Sex Discrimination, Civil Rights Div., Dep't of Justice).

17. In *In re Marriage of Brantner*, 67 Cal. App. 3d 416, 136 Cal. Rptr. 635 (1977), the court stated that a woman's "experience as a homemaker qualified her for either of two positions, charwoman or babysitter. A candidate for a well paying job she isn't." *Id.* at 420, 136 Cal. Rptr. at 637.

to be \$35,000 a year.¹⁸ Despite this contribution, a homemaker receives no salary, no fringe benefits, no pension, and no Social Security coverage in her own right.

Economic difficulties may arise for women homemakers,¹⁹ whether married or divorced, even though male breadwinners are subject to support obligations, both during marriage and upon divorce.¹⁹ During marriage, spousal support obligations of the husband are rarely enforced because of some courts' reluctance to interfere with the internal marriage relationship. In a landmark case in the area, the court articulated this notion:

The living standards of a family are a matter of concern to the household, and not for the courts to determine, even though the husband's attitude toward his wife, according to his wealth and cir-

18. Kaye, *Housewife Power*, PARENTS MAGAZINE 40, 44 (1979). Presently, a married couple cannot buy disability insurance coverage for the wife in the case she is injured and unable to perform her work. Insurance companies define insurable value in terms of income and the housewife has none. *Id.* Furthermore, no federal legislative action has been taken on the issue of wages for housework, even though government economists admit that the value of housework in the United States is worth \$350 billion in the gross national product. Coyote Howls, Spr. 1979, at 1, col. 3. (newspaper of the Nat'l Task Force on Prostitution, P.O. Box 26354, San Francisco, CA. 94126). According to a Chase Manhattan Bank study, the monetary value of homemaking duties would increase the GNP by 35%. *Hearings Before the Joint Economic Comm.*, 93d Cong., 2d Sess. 603 (1974) (statement of Nancy Seifer, Director, Women's Civil Liberty Union). For a discussion of the lack of economic recognition of homemaking and ways for homemakers to protect themselves, see L. WEITZMAN, *THE MARRIAGE CONTRACT: COUPLES, LOVERS, AND THE LAW* (1980); FELHKE & HAUSEMAN, *Homemaking: The Invisible Occupation*, 71 J. HOME ECON. 17 (1979); Hall, *The Case of the Late Mrs. Smith, Homemaker: Preparing Testimony for the Court*, 67 J. HOME ECON. 30 (1975).

19. A husband's duty to support his wife was imputed to the marriage contract at common law. The duty of support was perceived as a form of consideration for the husband's total, unilateral control and ownership of all matrimonial property. For a general description of the inequities women suffer within marriage, including the virtual impossibility of enforcing support obligations, see NATIONAL COMMISSION ON THE OBSERVANCE OF INTERNATIONAL WOMEN'S YEAR, *THE SPIRIT OF HOUSTON* 57-59 (1978) [hereinafter cited as *SPIRIT OF HOUSTON*]; Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 943 (1971); Weitzman, *Legal Regulation of Marriage: Trading and Change*, 62 CALIF. L. REV. 1169 (1974). See also Article, *Marriage as Contract: Towards a Functional Redefinition of the Marital Status*, 9 COLUM. J.L. & SOC. PROB. 607, 616-21 (1973) for a discussion of the historical development of matrimonial property law and the support obligation. For a discussion of premarital agreements, marriage contracts, and non-marital partnership agreements in establishing the rights of spouses during marriage and at dissolution, see *MARITAL AND NON-MARITAL CONTRACTS* (J. Krauskopf ed. 1979). For a discussion of the extent of judicial and state regulation of the marriage relationship and the potential benefits of marriage contracts, see Comment, *Marriage Contracts for Support and Services: Constitutionality Begins at Home*, 49 N.Y.U.L. REV. 1161 (1974).

cumstances, leaves little to be said in his behalf. As long as the home is maintained and the parties are living as husband and wife it may be said that the husband is legally supporting his wife and the purpose of the marriage relation is being carried out.²⁰

This rule applies whether a homemaker lives in a state subject to separate property law or community property law.²¹ Even in those community property states which provide for equal access by both spouses to community assets, the homemaker is limited in practice to those assets held in her name or jointly.²² The Na-

20. McGuire v. McGuire, 157 Neb. 226, 238, 59 N.W.2d 336, 342 (1953).

[A]lthough factual situations like that depicted in McGuire are probably not uncommon, there is a dearth of reported decisions. Why is this so? This dearth of decisions, coupled with the results of cases like McGuire, helps to explain why it is so difficult to determine the precise scope of a man's legal duty to support his wife and children *while the family is united*. Such support statutes as there are are characteristically unhelpful, and *the extent of his obligations is commonly inferred from the results in other types of litigation, such as divorce proceedings*, parents' suits under Dram Shop statutes for a child's death or injury, wrongful death actions, and criminal prosecutions or allied proceedings for non-support

C. FOOTE, R. LEVY, & F. SANDER, CASES AND MATERIALS ON FAMILY LAW 308 (1966) (emphasis added). For a discussion of the dearth of cases on support obligations during marriage see CITIZENS' ADVISORY COUNCIL ON THE STATUS OF WOMEN, THE EQUAL RIGHTS AMENDMENT AND ALIMONY AND CHILD SUPPORT LAWS (1972) [hereinafter cited as ERA AND SUPPORT LAWS].

21. The vast majority of states follow common law rules which provide that all property belongs to the person in whose name title is taken, including assets acquired by joint efforts of a married couple. Thus, a homemaker in a common law state would have power over only those assets in her name, e.g., checking and savings accounts, and real property. If no assets are in her name, her only recourse for enforcing her husband's support obligation is a lawsuit which is apt to be futile.

In contrast, in the eight community property states (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington), the wife has a joint interest with the husband in assets acquired during the marriage. As of 1979, all have equal management statutes except Texas and Louisiana, which deny equal management power to wives unless they are salaried outside the home. See ARIZ. REV. STAT. ANN. § 25-214 (1976); CAL. CIV. CODE § 5125 (West Supp. 1980); IDAHO CODE § 32-912 (1976); LA. REV. STAT. ANN. §§ 9: 3581-85 (West 1976); NEV. REV. STAT. § 123260 (1975); N.M. STAT. ANN. § 57-4A-8 (1976); TEXAS FAM. CODE ANN., tit. 1, § 5.22 (Vernon 1977); WASH. REV. CODE ANN. § 26.16.030 (1977).

22. Bingaman, *Equal Management of Community Property and Equal Credit Opportunity*, 13 IDAHO L. REV. 161, 162 (1977). For example, if a husband deposits his paycheck in a checking account held solely in his name, the homemaker cannot obtain any portion of it beyond what he chooses to give her. As in common law states, a commu-

tional Citizens' Advisory Council on the Status of Women accurately summarizes the present situation: "A married woman living with her husband can, in practice, get only what he chooses to give her."²³

Because the divorce rate has risen rapidly,²⁴ the issues of spousal support and child support have become increasingly important. Even though the number of divorces has increased, the number of women awarded spousal support has decreased.²⁵ It is commonly believed that a divorcee maintains a high standard of living on her ex-husband's money. However, spousal support is awarded in only fourteen percent of all divorces,²⁶ and is, in fact, actually paid an even smaller percentage of the time.²⁷

Some women who dissolve "short" marriages are not awarded any spousal support or receive support for only a brief period of time.²⁸ In addition, neither property settlements nor

nity property homemaker may enforce her right to support only by filing a civil complaint; such a remedy is illusory, however, as it is typically ineffectual. For a further discussion of the difficulties of enforcing support obligations during an ongoing marriage, see Weitzman, *supra* note 19, at 1172. See also Gabler, *The Impact of the ERA on Domestic Relations Law: Specific Focus on California*, 8 FAM. L.Q. 51 (1974) (regarding the application of the ERA to marital rights in California); Comment, *Determining the Liability of Community Property*, 29 BAYLOR L. REV. 608 (1977) (regarding a community property wife's liability for debts created during a marriage); Note, *supra* note 19, at 607 (regarding the history of marital legalism, state regulation of marriage, and spouses' opportunities for genuine contractual rights for matrimonial support).

23. ERA AND SUPPORT LAWS, *supra* note 20, at 1.

24. The latest census shows that one out of three marriages is ending in divorce. U.S. BUREAU OF THE CENSUS, SERIES P-20, NO. 312, CURRENT POPULATION REPORTS, MARRIAGES, DIVORCE, WIDOWHOOD, AND REMARRIAGE BY FAMILY CHARACTERISTICS: 1975, AT 7 (1978). THE DIVORCE RATE BEGAN ACCELERATING IN THE EARLY 1960'S; FROM 1962 TO 1973 THE ANNUAL TOTAL DOUBLED FROM 413,000 TO 915,000. DEP'T OF HEW, PUB. NO. (PHS) 78-1907, Z, DIVORCES AND DIVORCE RATES (1978).

25. Nagel & Weitzman, *Women as Litigants*, 23 HASTINGS L.J. 171, 190 n.50 (1971). See also Weitzman, *supra* note 19, at 1195.

26. SPIRIT OF HOUSTON, *supra* note 19, at 58.

27. No more than seven percent of divorced men actually make spousal support payments. *Id.*

28. "For short term marriages (seven years or less), spousal support is less likely to be awarded unless the needs of young children preclude employment or a spouse can prove, after a good faith effort to obtain employment, that it is not available." D. KING, GUIDELINES FOR DOMESTIC RELATIONS CASES BEFORE DONALD B. KING 14 (1977). For a discussion of factors some courts look to in determining whether a marriage is "short" as well as factors used in determining alimony orders in these "short" marriages, see Inker, Walsh & Perocchi, *Alimony Orders Following Short-Term Marriages*, 12 FAM. L.Q. 91 (1978).

"When spousal support is awarded in short term marriages, the duration of the sup-

awards of spousal support consistently take into account a homemaker's unpaid labor during the marriage; thus all too often, homemakers receive settlements which are technically equal, but because of their limited earning capacities, leave them economically far behind their former husbands.²⁹

Although most courts award custody of children, especially young children, to the mother,³⁰ they may not at the same time award her adequate child support payments.³¹ As with spousal support, child support is seldom actually received.³² One study indicated that within one year after entry of the dissolution decree, only thirty-eight percent of the ex-husbands ordered to pay child support were in full compliance with the support order; by

port will be short, usually a period of less than one-half of the time between the dates of marriage and separation, except where the needs of young children preclude employment for a longer period of time." D. King, *supra*, at 14.

29. See Comment, *Rehabilitative Spousal Support: In Need of a More Comprehensive Approach to Mitigating Dissolution Trauma*, 12 U.S.F. L. REV. 493, 513-17 (1978). For discussion of a recent Oregon case expressly recognizing the value of the homemaker's contribution of marital assets, see *Family Law—Determination of Spousal Support: Grove and Grove*, 57 OR. L. REV. 566 (1978).

30. Estimates of the percentage of cases in which the wife obtains custody of the children of a marriage vary, but all place the figure between 80 and 95%. B. BABCOCK, A. FREEDMAN, E. NORTON & S. ROSS, *SEX DISCRIMINATION AND THE LAW* 681 (1975) [hereinafter cited as BABCOCK]. For a discussion of present trends in child custody laws, see Eder, *Shared Custody: An Idea Whose Time Has Come*, COUNCILIATION COURTS REV., June 1978, at 23; Porter & Walsh, *The Evaluation of California's Child Custody Laws: A Question of Statutory Interpretation*, 7 SW. U.L. REV. 1 (1975); Ramey, Stender, Smaller, *Joint Custody: Are Two Homes Better Than One?*, 8 GOLDEN GATE U.L. REV. 559 (1979); Schiller, *Child Custody: Evolution of Current Criteria*, 26 DE PAUL L. REV. 241 (1977); Weitzman & Dixon, *Child Custody Awards: Legal Standards and Empirical Patterns for Child Custody, Support and Visitation After Divorce*, 12 U.C.D.L. REV. 473 (1979).

31. See notes 27-29 *supra*. See also K. AMUNDSEN, *NEW LOOK AT THE SILENCED MAJORITY* 27, 28 (1977).

32. In 1975, 1.3 million women received child support from fathers of their children. This figure represented only 25% of the mothers who were divorced, separated, remarried after a divorce, or never married. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, SERIES P-23, NO. 84, *DIVORCE, CHILD CUSTODY, AND CHILD SUPPORT* 358 (1979). For about half the fathers, support payments amounted to less than ten percent of their total income. Of women receiving payments, 60% received less than \$1,500 during 1975. *Id.* at 359. For non-married mothers, child support from the father may be more difficult to obtain, even though nearly all states require the father to support his child. Tabler, *Paternal Rights in the Illegitimate Child: Some Legislative Complaints on Behalf of the Unwed Father*, 11 J. FAM. L. 231, 248 (1971). CAL. CIV. CODE § 196a (West Supp. 1980) provides: "The father as well as the mother of a child must give him support and education suitable to his circumstances." California case law has interpreted this statute as reflecting the public policy that illegitimate and legitimate children are to be treated alike. *Stargell v. Stargell*, 263 Cal. App. 2d 504, 69 Cal. Rptr. 715 (1968).

the fifth year, this figure had dropped to nineteen percent.³³

The effects of dissolution in no-fault divorce states³⁴ are even harsher than under the adversary system. Under the no-fault system, the couple need only demonstrate irreconcilable differences for a divorce to be granted.³⁵ Under the adversary system, some fault (i.e. cruelty or adultery) must be proven. Under the latter system, women have more bargaining power to negotiate an adequate support settlement.³⁶ A California study on the financial effects of no-fault divorce³⁷ found that after switching to a no-fault system both child support³⁸ and spousal support awards decreased.³⁹ Furthermore, under a no-fault system, couples often divorced when their children were younger,⁴⁰ thus necessitating childcare expenses for a longer period of time. The combined effects of inadequate spousal awards upon dissolution and the high incidence of non-support by fathers comprise a major reason divorced and unmarried mothers of minor children must rely on welfare benefits.⁴¹

33. ERA AND SUPPORT LAWS, *supra* note 20, at 8.

34. All but three states (Illinois, Pennsylvania, and South Dakota) have some form of no-fault divorce. Foster, *Joint Custody*, 15 TRIAL 26, 27 (1979).

35. See, e.g., CAL. CIV. CODE § 4506 (West Supp. 1980): "A court may decree a dissolution of the marriage or legal separation on either of the following grounds, which shall be pleaded generally: (1) Irreconcilable differences, which have caused the irremediable breakdown of the marriage. (2) Incurable insanity." For a general discussion of the no-fault system, see Comment, *Irreconcilable Differences: California Courts Respond to No-Fault Dissolutions*, 7 LOY. L.A.L. REV. 453 (1974); Comment, *The End of Innocence: Elimination of Fault in California Divorce Law*, 17 U.C.L.A. L. REV. 1306 (1970).

36. Nagel & Weitzman, *supra* note 25, at 171, 188. For example, if the husband is plaintiff, but lacks legal grounds for a divorce, he will need his wife's cooperation, thus increasing her bargaining power.

37. K. Seal, *No-Fault Divorce: A Financial Disaster for California Women* (1979) (unpublished Ph.D. thesis, available through United States International University in San Diego). In 1977, Seal randomly selected 600 divorce cases in the county of San Diego. Three hundred were from the period when California had an adversary system, using 1968 as the base year; 300 were subsequent to California's transition to the no-fault system, using 1976 as the base year.

38. Under the adversary system, the median amount of child support awarded per month per child was \$75; under no-fault, \$61 (measured in constant 1968 dollars to control for inflation). *Id.* at 7.

39. Under the adversary system, the median amount of monthly alimony awarded was \$99; under the no-fault system, the median amount dropped to \$61 (in constant 1968 dollars). *Id.*

40. Under the adversary system, the median age of the youngest child was 5.3 years; under no-fault, 4.4 years. *Id.*

41. In 1974, the U.S. General Accounting Office found that half the absent fathers of welfare children had incomes over \$8,500 a year. Of those who earned over \$12,000 a year, 70% failed to support their children. L. KOMISAR, *supra* note 12, at 150. See gener-

B. INCOME-EARNING WOMEN: DISCRIMINATION IN EMPLOYMENT

Women who pursue careers, or attempt the dual roles of homemaker and labor force participant, receive little support or encouragement to develop economic independence. Despite the recent influx of women into the labor force and media attention to isolated improvements, the job market remains dismal for women.⁴² The United States Supreme Court has recognized that continued economic discrimination against women and the socialization process of a male-dominated culture combine to make "the job market . . . inhospitable to the woman seeking any but the lowest paid jobs."⁴³

Women's median earnings are less than sixty percent of men's earnings, and are declining.⁴⁴ This situation is due in large

ally, M. WINSTON & I. FORSHER, NON-SUPPORT OF LEGITIMATE CHILDREN BY AFFLUENT FATHERS AS A CAUSE OF POVERTY AND WELFARE DEPENDENCE (1974). This Rand Corporation study covered five California counties and found that non-paying fathers were represented equally at *all* class levels: ten percent of non-paying fathers were white collar professionals; eight percent were blue collar workers. Furthermore, the amount of child support awarded to the mother averaged only \$50 a month. *Id.* at 15-16.

42. The Equal Employment Opportunity Commission (EEOC) surveyed female employment in the private sector between 1966 and 1975 and measured the progress of women toward fair-share goals in level of employment, job quality and salary level. Eleanor Holmes Norton, Chair of the EEOC, described these years as "a period of moderate change for women workers. . . . Progress has been made, but gaps between fair-share goals and the actual employment of women remain." NORTON, U.S. E.E.O.C. RESEARCH REPORT No. 56, WOMEN: THE PATH TO EQUAL EMPLOYMENT at i(1977). Ms. Norton's description of the situation is understated. For example, based on its own research, the EEOC projected that over 100 years would be required for women to achieve parity in crafts jobs. *Id.* at 194, Table 26A. It also projected that 26 years would be necessary for parity in managerial jobs and 18 years for operatives jobs. *Id.* See notes 43-69 *infra* and accompanying text. See also, L. HOWE, PINK COLLAR WORKERS (1977); A. SIMMONS, A FREEMAN, M. DUNKLE & F. BLAU, TASK FORCE ON WORKING WOMEN: EXPLOITATION FROM 9-5 (1975) [hereinafter cited as SIMMONS & FREEMAN]; BLUMROSEN, *Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964*, 12 U. MICH. J.L. REFORM 399, 410-14, 425-26 (1979).

43. *Kahn v. Shevin*, 416 U.S. 351, 353 (1974). See also *Califano v. Webster*, 430 U.S. 313, 318 (1977)(per curiam). Although the holdings in these cases may be subject to criticism, the court's factual findings are incontestable. In *Kahn*, both the majority and the dissent agreed in the finding of discrimination in the job market. 416 U.S. at 353 (majority), 358-59 (dissent). "In 1970, while 40% of males in the work force earned over \$10,000, and 70% over \$7,000, 45% of women working full time earned less than \$5,000, and 73.9% earned less than \$7,000." *Id.* at 353 n.4, citing U.S. BUREAU OF THE CENSUS: CURRENT POPULATION REPORTS, SERIES P-60, No. 80.

44. In 1950, women's earnings were 63% of men's earnings. By 1976, they had dropped to 57%. WOMEN'S BUREAU, U.S. DEP'T OF LABOR, WOMEN WORKERS TODAY 9 (1976). In 1977, the median earnings for all employed women were \$6,828 compared to \$12,465 for men. For full-time employed workers, the median earnings of women were

part to the continued concentration of women in low-paying, female-intensive industries and occupations.⁴⁵ Women are channeled into these industries and occupations by inadequate high school and vocational education.⁴⁶ When women do receive vocational training, it is usually in low-paying clerical and service occupations.⁴⁷ Women do not escape this pay disparity by higher educational attainment. In 1974, a woman college graduate was

\$8,618 compared to \$14,626 for men. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, No. 690, STATISTICAL ABSTRACT OF THE U.S., MEDIAN EARNINGS OF WORKERS BY WORK EXPERIENCE AND SEX: 1977, at 419 (1979). For further discussion of earnings differences, see Hedges & Mellor, *Weekly and Hourly Earnings of U.S. Workers, 1967-78*, MONTHLY LABOR REV., Aug. 1979, 31.

45. The service sector, defined by the United States Department of Labor's Women's Bureau to include household workers, cleaners and janitors, food service workers, health service workers, and personal service workers, is the single most important employer of women. In 1973, nearly *one-fourth* of all women workers were employed in this sector, making up approximately 63% of all service workers. WOMEN'S BUREAU, U.S. DEP'T OF LABOR, BULL. No. 297, 1975 HANDBOOK ON WOMEN WORKERS, 90 (1975). In 1973, approximately 2.2 million women were employed as sales workers. *Id.* at 89. However, they were concentrated in the lower paying trades, such as in ready-to-wear sales or in eating and drinking establishments. K. AMUNDSEN, *supra* note 31, at 35-36. Male sales workers were concentrated in the higher-paying sales trades, that include the sale of automobiles, farm equipment, building materials, insurance and real estate. *Id.* at 35. See generally WOMEN AND THE WORKPLACE: THE IMPLICATIONS OF OCCUPATIONAL SEGREGATION (M. Blaxall & B. Reagan eds. 1976). See also BARRETT, OCCUPATIONS, EARNINGS, AND CAREER OPPORTUNITIES, IN THE SUBTLE REVOLUTION: WOMEN AT WORK 46-54 (R. Smith ed. 1979)(discussing occupational segregation by sex); Blumrosen, *supra* note 42, at 399 (extensively developing the thesis that job segregation and wage discrimination are intimately related because the wages of jobs into which women are channeled are discriminately depressed).

46. The percentage of girls in traditionally male vocational high school classes has increased by only one percent since 1972. EDUCATION AMENDMENTS OF 1978, PUB. L. No. 95-561, 77 (1978). A 1978 New York study found that 94% of the students tracked into an apparel manufacturing program were women. They had been led to believe they were preparing for glamorous fashion careers, but were actually entering garment manufacturing, one of New York's lowest paying industries. Baker, *Women in Blue Collar and Service Occupations*, in WOMEN WORKING: THEORIES AND FACTS IN PERSPECTIVE 348 (A. Stromberg & S. Harkness eds. 1978)[hereinafter cited as WOMEN WORKING].

47. Vocational education trains girls for low-paying jobs in home economics, clerical business skills, and health; high school vocational education graduates in business skills education (mainly girls) earn much less than technical and industry trade graduates (mainly boys). Trecker, *Room at the Bottom: Girls' Access to Vocational Training*, 38 Soc. Educ. 533 (1974).

In 1979, national feminist and educational organizations charged that Joseph Califano's refusal to enforce Title IX in intercollegiate athletics and widespread delays in Title IX enforcement generally were direct violations of a previous court order requiring HEW to enforce Title IX. Note, *Title IX*, SPOKESWOMAN, Aug. 1979, at 7. See A. Moesser, Resource Bank for Overcoming Sex Bias and Stereotyping in Vocational Education (1979) (distributed by National Center for Research in Vocational Education Publications, Ohio State University, 1960 Kenny Rd., Columbus, Ohio 43210)(regarding recognition of present inequities in vocational education).

likely to earn less per year than a man with only an eighth grade education.⁴⁸ Furthermore, women employed in lucrative male-intensive professional and skilled technical positions, still earn considerably less than their male counterparts.⁴⁹

One reason that female-intensive industries and occupations remain low-paid is the lack of unionization.⁵⁰ Male clerical workers, mail carriers, and shipping and receiving clerks are more likely to be organized by unions than female clerical workers, typists, secretaries, and bank tellers.⁵¹

Women with young children face the additional problem of inadequate childcare, making employment impossible for many. Society's traditional expectation that a woman devote herself totally to the care of her children is reflected in the lack of quality low cost childcare,⁵² flexible work hours, and opportunity for adequately paid part-time work.⁵³ The socialized belief that wo-

48. WOMEN'S BUREAU, U.S. DEP'T OF LABOR, THE EARNINGS GAP 24 (1976).

49. See Blumrosen, *supra* note 42, at 408.

50. In 1952, over 15% of women in the labor force held union cards. By 1972, the number holding union cards had dropped to 12%. Berquist, *Women's Participation in Labor Organizations*, MONTHLY LAB. REV., Oct. 1974, at 3. For a technical analysis and comprehensive resource on contract negotiations for women's issues, including samples of model contracts, see Women's Labor Law Project, Bargaining for Equality (1980)(available through WLLP, 558 Capp St., San Francisco, CA.). For a guide to organizing women workers, strategies for contract negotiations, and a comprehensive bibliography, see UNION W.A.G.E., ORGANIZE: A WORKING WOMEN'S HANDBOOK (1975).

51. LeGrande, *Women in Labor Organizations: Their Ranks Are Increasing*, MONTHLY LAB. REV., Aug. 1978, at 8, 9-10. Among blue collar workers, unions have generally attempted to organize plants which already have higher wages (plants which are likely to have fewer women) because the cost of organizing these plants will be offset by higher membership dues. Consequently, women have often been left to organize themselves or to remain unorganized. ROBY, THE CONDITION OF WOMEN IN BLUE COLLAR JOBS, IN ECONOMIC INDEPENDENCE FOR WOMEN 177 (J. Chapman ed. 1976).

52. In the United States in 1974, there were almost 27 million children with working mothers, while the estimated number of children who could be cared for in licensed day care facilities in 1972 was only one million. 1975 HANDBOOK, *supra* note 42, at 32, 35. Today, because of the lack of day care centers, 90% of the children of working mothers are cared for informally by a sibling, relative, or paid worker. Moore & Sawhill, *Implications of Women's Employment for Home and Family Life*, in WOMEN WORKING, *supra* note 46, at 211.

Quality childcare is still far from realization. In January 1979, Sen. Alan Cranston (D. Cal.) introduced S. 4, 96th Cong., 2nd Sess. a bill to assist and coordinate in the provision of childcare services to working parents. The bill is pending in the Senate Human Resources Committee, but no action is expected in this Congress.

53. The average hourly rate for part-time workers in 1977 was \$2.87, compared to \$5.04 for full-time workers. Voluntary Part-time Laborers, MONTHLY LAB. REV., June

men's "paramount destiny is . . . to fulfill the noble and benign offices of wife and mother",⁵⁴ coupled with the lack of a "wife" at home to meet child-centered emergencies, cause women to have longer periods of interrupted employment and to be perceived as less committed workers.⁵⁵ These interruptions and perceptions make upward mobility difficult or impossible, often preventing acquisition of seniority and vesting of rights in a pension plan.⁵⁶

The impact of these discriminatory practices — lack of valuation of homemaking, sex-segregation, and undervaluation of women's labor, low wages, lack of technical training, poor union representation, and inadequate childcare — forces women from every economic level into the marginal labor force where employment is irregular, training infrequent, and promotions nonexistent.⁵⁷

Legislation enacted to remedy employment discrimination based on sex has not been totally successful. For example, al-

1978, at 8. Further, part-time and temporary workers are generally excluded from retirement plans, health insurance, seniority, on-the-job training and promotion. Baker, *supra* note 46, at 351. Most do not receive vacation or sick pay. Susco, *Title VII and Employee Benefit Plans: Beyond the Fringe?*, 10 CONN. L. REV. 947, 953 (1978).

Women who would prefer full-time work are sometimes limited to part-time employment because such workers are cost-efficient for employers. Fringe benefits, which now constitute 25 to 40% of total payroll costs, can largely be avoided by hiring employees for less than 40 hours per week. Note, *Sex Discrimination in Employee Fringe Benefits*, 17 WM. & MARY L. REV. 109, 109 (1975).

54. *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141-42 (1873), (Bradley, J.).

55. Blumrosen, *supra* note 42, at 447-48. Female teachers who leave their jobs most frequently give family responsibilities as the reason. D. LORTIE, *SCHOOL TEACHER: A SOCIOLOGICAL STUDY* 86-87 (1975). Evidence on rates of exit is sparse, but the little that does exist indicates similar rates for men and women. However, women are more likely to quit for family reasons while men quit for reasons of professional advancement. Simpson & Simpson, *Women and Bureaucracy in the Semi-Professions*, in *THE SEMI-PROFESSIONS* 196 (A. Etzioni ed. 1976). When children are sick the mother is more likely than the father to stay home with them, partly because of social conditioning and partly because her job pays less and is considered less important. See note 21 *supra*.

56. For a discussion of discrimination in pension plans, see notes 143-153 and 165-177 *infra* and accompanying text.

57. Two economies have developed in America. One is an economy of affluence, the other an economy of poverty. Persons born to the wrong parents, in the wrong part of town, of the wrong race—or of the wrong sex—are more likely to be poorly trained and unable to find jobs, and to have low incomes, bad health, and inferior housing. For further discussion of the marginal or dual economy in the United States, see W. TRATTNER, *supra* note 12, at 250-64; D. TUSSING, *supra* note 12, *passim*.

though the impact of Title VII of the Civil Rights Act of 1964⁵⁸ in combatting sex discrimination in employment is potentially far-reaching,⁵⁹ the procedural hurdles,⁶⁰ proof problems,⁶¹ and

58. 42 U.S.C. §§ 2000e to 2000e-17 (1976).

59. The statutory provisions against discrimination are expansive:

(a) It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual or employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id. § 2000e-2(a)(1974).

60. For example, a claimant must file a charge with the EEOC within 180 days of the alleged discriminatory act. *Id.* § 2000e-5(e). If the EEOC does not resolve the problem and issues a right-to-sue letter, the claimant must commence litigation within 90 days of receipt of the letter. *Id.* § 2000e-(f)(1). For further discussion of the procedural requirements of Title VII, see Babcock, *supra* note 30, at 368-75, B. SCHLEI & P. GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 769-960 (1976).

These procedural problems are exacerbated by the limited effectiveness of the EEOC in processing and investigating claims. See BARRETT, *supra* note 45, at 56; Modjeska, *The Regressive Reorganization of Federal Employment Discrimination Laws*, 44 Mo. L. Rev. 680, 686-87 (1979) (describing the lack of enforcement powers and heavy caseload which contribute to the EEOC's inefficiency). The EEOC had a backlog of 98,000 charges on June 30, 1974, which increased steadily to 130,000 on April 30, 1977. U.S. COMM'N ON CIVIL RIGHTS, *FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT—1977*, at 211 (1977). See also Moore v. Memphis Light, Gas & Water Div. [1979] 21 Fair Empl. Prac. Cas. 147, 21 Empl. Prac. Dec. 13, 127 (W.D. Tenn. Sept. 17, 1979), making an exception to the jurisdictional prerequisite of filing a charge with the EEOC where the EEOC improperly denied plaintiff the opportunity of filing. President Carter's reorganization of enforcement responsibilities under federal employment discrimination laws will probably cause this situation to deteriorate further. See generally Modjeska, *supra*.

61. Proving discrimination under Title VII has been made more difficult by a number of recent United States Supreme Court cases, notably Massachusetts v. Feeney, 442 U.S. 256 (1979); United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977); East Tex. Motor Freight Sys. Inc. v. Rodriguez, 431 U.S. 395 (1977); and International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977). For a discussion of the impact these cases have had on proving employment discrimination under Title VII, see Blumrosen, *supra* note 42, at 491-92; Lach, *A Liability Loophole for the Undeserving?: Timeliness in Title VII Challenges After United Air Lines v. Evans*, 3 INDUS. REL. L.J. 72 (1979); Rosenberg, *Class Actions After Rodriguez: A Look at the Early Returns in PRACTICING LAW INSTITUTE, EMPLOYMENT DISCRIMINATION* 1979, 163 (1979); Comment, *The Proper Scope of Representation in Title VII Class Actions: A Comment on East Texas Motor Freight System, Inc. v. Rodriguez*, 13 HARV. C.R.L. REV. 175 (1978); Note, *The Seniority System Exemption in Title VII: International Brotherhood of Teamsters v. United States*, 6

stated exceptions⁶² reduce the short-term, practical effect of Title VII on women's employment situation. The enormous cost and lengthy period of time required for litigation further underscore the limitations of Title VII as a vehicle for changing behavior and attitudes that lock women into an inferior economic position.⁶³

The Equal Pay Act of 1963⁶⁴ is another example of ineffective remedial legislation. This law requires employers to pay equal salaries to men and women where their jobs require equal skill, effort, and responsibility and are performed under similar working conditions in the same establishment.⁶⁵ Employers may pay men and women different salaries, however, when the differential is based on any factor other than sex.⁶⁶ As with Title VII, the Equal Pay Act presents formidable proof problems. It is often difficult to convince a court that particular jobs are sub-

HOFSTRA L. REV. 585 (1978); Comment, *Teamsters, Evans, and Title VII: Will Women Be the Ultimate Losers?*, 72 NW. U.L. REV. 761 (1978). See also Blumrosen, *supra* note 42, at 469-90; Gitt & Gelb, *Beyond the Equal Pay Act: Expanding Wage Differential Protections Under Title VII*, 8 LOY. U.L.J. 723 (1977), for a discussion of Title VII's limited effectiveness regarding wage discrimination.

62. Title VII permits sex discrimination where gender is a bona fide occupational qualification (BFOQ), i.e., one which is necessary to the successful performance of the job. 42 U.S.C. § 2000e-2(e)(1978). In some cases, BFOQ has been given an overly broad interpretation. For example, in *Dothard v. Rawlinson*, 433 U.S. 321 (1977), the Supreme Court stated vaguely that "a woman's relative ability to maintain order in a . . . penitentiary . . . could be directly reduced by her womanhood." *Id.* at 335. Thus, the Court has adhered to the very stereotypes that Title VII should overcome. For further discussion of the BFOQ exception, see James & Alaimo, *BFOQ: An Exception Becoming the Rule*, 26 CLEV. ST. L. REV. 1 (1977); Comment, *Dothard v. Rawlinson: Misapplication of the Bona Fide Occupational Qualification Defense*, 22 ST. LOUIS U.L.J. 197 (1978); Comment, *Dothard v. Rawlinson: A Method of Analysis for Future BFOQ Cases*, 16 URB. L. ANN. 361 (1979).

63. Due to the time-consuming and expensive nature of litigation, arbitration is being used with increasing frequency to resolve employment discrimination disputes. See Edwards, *Arbitration as an Alternative in Equal Employment Disputes*, 23 ARB. J. 22 (1978); Oppenheimer & LaVan, *Comparing Arbitration and Litigation in Employment Discrimination Cases*, MONTHLY LAB. REV., May 1979, at 35. For a description of the difficulties a woman may encounter in asserting her rights under Title VII, including high costs and lengthy periods of time, see Zanca, *Surviving the Fallout*, WOMEN'S WORK, Sep./Oct. 1978, at 27. See also Frug, *Securing Job Equality for Women: Labor Market Hostility to Working Mothers*, 59 B.U.L. REV. 55, 102-03 (1979) (regarding the inadequacy of employment laws); Kahn & Ingman, *Sex Discrimination in Employment*, 129 NEW L.J. 739 (1979).

64. 29 U.S.C. §§ 201-219 (1976 & Supp II 1978).

65. *Id.* § 206(d)(1)(1976).

66. *Id.* § 206 (d)(1)(iv).

stantially equal in skill and responsibility,⁶⁷ and equally difficult to demonstrate that the different wage scale is sex-related.⁶⁸ Further, the Act does not address the undervaluation of jobs into which women have been traditionally segregated, such as secretary, typist, and telephone operator, and thus leaves unchallenged low wages in female-intensive occupations.⁶⁹

67. One reason the Equal Pay Act has had little impact on wage discrimination is that different job titles have been utilized to hide the fact that women and men are performing identical work. Blumrosen, *supra* note 42, at 407-08. Further, many lower courts, in attempting to assess whether jobs are 'equal' under EPA standards, seem to look at the kind of information an industrial engineer would use to design a job or do a time and motion study, not the information which experts in the field of job evaluation think pertinent for evaluation purposes.

Id. at 432 n.140. See also BABCOCK, *supra* note 30, at 441, and Gitt & Gelb, *supra* note 61, at 742, regarding the narrow interpretation long given the Equal Pay Act.

68. BARRETT, *supra* note 45, at 35. See also Blumrosen, *supra* note 42; Gitt & Gelb, *supra* note 61.

69. As discussed in notes 65 and 67 *supra* and accompanying text, enforcement of the Equal Pay Act has been limited to those situations where men and women perform the same work. Thus, where women perform different jobs due to sex segregation, wage discrimination claims have been generally unsuccessful. Wage discrimination is a continuing problem since little headway has been made in integrating jobs on the basis of sex. One way to measure progress, or the lack of it, is to determine the percentage of women who would have to change jobs in order for the occupational distribution of women workers to be the same as that of male workers. This "index of segregation" was 66.9 in 1900 and 68.4 in 1960. Thus, sex segregation of jobs actually increased over this period of time. In contrast, the index of racial segregation was 46.8 in 1960. SIMMONS & FREEMAN, *supra* note 42, at 50. The only major study of salary differentials between men and women in state employment is the Comparable Worth Study by Willis and Associates, cited in Tarr-Whelan, *Women Workers and Organized Labor*, Soc. POL'Y, May/June 1978, at 13, 15. The Comparable Worth Study examined those occupations in Washington state filled in 1974 predominantly (70% or more) by either sex. The jobs were rated according to knowledge and skills required, mental demands, accountability, and working conditions. The results showed essentially two separate pay systems: at the lowest level jobs, the difference between men's and women's pay in comparable occupations was \$150 a month; at the highest level, the difference was about \$400 a month. Women state employees were underpaid a total of \$40,000,000 in 1974. *Id.* Various research studies have found that similar wage differentials exist even *after* adjustment so that factors such as education, experience, and occupation group were equal. WOMEN'S BUREAU, DEP'T OF LABOR, *WOMEN WORKERS TODAY* 9 (1976). The federal government's job grading process presents a cogent example of job segregation by grade level. Seventy-five percent (400,000) of the women employed by the government are found in grades one through six (on a scale of 18 grades) while one percent (9,000) are found in grades 13 and above. An analysis by the International Women's Year Commission of the policy-making positions (grades 16 through 18) found 26 women compared to 7,161 men. Tarr-Whelan, *supra*, at 13.

Blumrose, *supra* note 42, explores in depth comparable worth arguments, develops theories for a *prima facie* case, and discusses defenses employers may raise. See also D. Treiman, *Job Evaluation: An Analytic Review* (1979) (Interim Report to the EEOC)

C. AID TO FAMILIES WITH DEPENDENT CHILDREN

The adage that "every dependent woman is just one man away from poverty" remains true today. Should a woman be laid off from her job or not receive a support payment from an ex-husband, her tenuous financial stability can be destroyed. In such circumstances, she might be forced to turn to welfare for her own and her children's survival. Even when a woman is employed, her wages may be so low that she is compelled to seek intermittent support from welfare benefits.⁷⁰

The welfare program for which women with young children are eligible is Aid to Families with Dependent Children (AFDC).⁷¹ Families with one or more dependent children who have been deprived of parental support by the absence, or in some states, the unemployment of the primary wage-earning parent, are eligible for this federal program.⁷²

Recipients of AFDC benefits often have been subjected to inordinate governmental interference in their private lives, with or without their consent.⁷³ One such means of intrusion has been

(available from the Nat'l Academy of Sciences, Wash. D.C.). Recognizing that sex discrimination often takes the form of different valuations of similar work, this recent study attempted to develop a generally acceptable concept of relative worth of jobs, and explore whether such a concept could provide a suitable basis for job measurement in the context of wage discrimination disputes. The Committee reserved judgment on these issues until issuance of its final report projected for 1980.

70. In 1975, more than 26% of women on AFDC rolls were in the labor market: 16% were employed, nine percent were actively seeking work, and one percent were awaiting recall from layoff. Further, about ten percent were registered for the Work Incentive (WIN) program. Oberheu, *Studies of the Characteristics of AFDC Recipients*, Soc. SECURITY BULL., Sep. 1977, 15, 19. See notes 85-95 *infra* and accompanying text for a discussion of the WIN program and its failure to help poor women.

As Dale Tussing noted in *DUAL ECONOMY*, *supra* note 12, at 7, low earnings and the inability to seek work are more strongly associated with poverty than actual unemployment. For further discussion of working welfare mothers, see Carter, *The Employment Potential of AFDC Mothers*, WELFARE REV., Jul./Aug. 1968, 1; Pearce, *The Feminization of Poverty: Women, Work and Welfare*, 2 URB. SOC. CHANGE REV. 28, 29 (1978).

71. 42 U.S.C. §§ 601-44 (1975).

72. For eligibility requirements, see CAL. WELF. & INST. CODE § 11250 (West 1980); 42 U.S.C. § 606(a)(1976).

73. A. LAFRANCE, *LAW OF THE POOR* 334 (1973). The interference can take the form of numerous application documents or bureaucratic inefficiency. For instance, in 1977 the Commission on Federal Paperwork reported: "A typical [welfare] case file in New York City contains over 700 application documents." CHILDREN'S DEFENSE FUND, WASHINGTON RESEARCH PROJECT, *FOR THE WELFARE OF CHILDREN* 9 (1978)(1520 New Hampshire Av., N.W., Wash. D.C. 20036) [hereinafter cited as WELFARE OF CHILDREN].

the caseworker's home visits; those visits provide the caseworker an opportunity to determine continued eligibility⁷⁴ of the family and to look for evidence of fraud through routine interrogation of the mother and her children.⁷⁵ The AFDC recipient has also been faced with sex stereotyping by which a double standard of morality is applied in an attempt to control her sexual activity.⁷⁶ Welfare personnel may attempt to delve into a recipient's private life and interfere with her sexual activity in order to prevent future pregnancies since new children born into a recipient home increase welfare expenditures, and the necessity for increased funding often causes political problems for local welfare administrators.⁷⁷ Consequently, uncooperative recipients can be

74: Such checks were required by federal regulations until 1975. 45 C.F.R. § 206.10(a)(1975). Presently the regulations do not specifically require home visits, but provide that eligibility will be redetermined "on the basis of information the agency has obtained previously . . ." or "after a report is obtained which indicates changes in the individual's circumstances . . ." 45 C.F.R. § 206.10(a)(9)(i), (ii)(1979).

75. A. LaFrance, *supra* note 73, at 335. For a discussion of the negative effects of home visits, see Note, *Rehabilitation, Investigation, and the Welfare Home Visit*, 79 YALE L.J. 746 (1970).

76. The traditional double standard for women is evident in former AFDC regulations concerning the sexual activity of female welfare recipients, such as the suitable home rule (the presumption that any home where an illegitimate child was born after the mother's receipt of welfare benefits was unsuitable), and the man-in-the-house rule (a man living with a welfare mother destroyed her eligibility, or his income was credited to her family for eligibility purposes). For a complete discussion of these welfare policies, see *King v. Smith*, 392 U.S. 309, 320-27 (1968); BELL, *AID TO DEPENDENT CHILDREN* (1965). Federal regulations have been passed which reject the man-in-the-house rule as a basis for determination of AFDC eligibility. 45 C.F.R. § 233.90(a)(1979). See *Lewis v. Martin*, 397 U.S. 552 (1970) (where the Supreme Court upheld the HEW regulation that state agencies ignore a man in the house unless he is actually contributing to the family finances); *Taylor v. Martin*, 330 F. Supp. 85 (N.D. Cal.), *aff'd sub nom. Carleson v. Taylor*, 404 U.S. 980 (1971) (where the court rejected state regulations which terminated AFDC benefits on the basis of the parent's sexual conduct). For a discussion of sex-stereotyping in welfare programs, see generally D. Tussing, *supra* note 12, at viii-ix, 84-87; Tilmon, *Welfare is a Woman's Issue*, Ms., Apr. 1974, at 111, 112.

77. A. LaFrance, *supra* note 73, at 338.

As a rule, the poorer states are under greater pressure to administer public aid with stringency. In all the states, rich and poor, a variety of strategies may be employed to meet politically-demanded results. The scope of coverage under a welfare program obviously sets the potential limits of charges on public funds. By restricting the definition of classes of eligible persons a state may control the total caseload of persons reliant on governmental support under that particular program.

Handler & Rosenheim, *Privacy in Welfare: Public Assistance and Juvenile Justice*, 31 L. CONTEMP. PROBS. 377, 380 (1966) (citations omitted). For a discussion of arbitrary eligibility standards, see Comment, *Social Welfare Law-The AFDC-UF Program and State Eligibility Discretion*, 23 N.Y.L. SCH. L. REV. 743 (1978).

threatened with administrative action or denial of benefits.⁷⁸ The agency may use the home visit to subject the recipient to close scrutiny and may decide the home is not suitable for children.⁷⁹ As recently as 1971, the Supreme Court held that home visits by the welfare agency do not fall under the fourth amendment proscription against unreasonable searches and seizures.⁸⁰

An additional intrusion into the recipient's private life is found in the federal rule that a recipient must assign to the states any rights to child support as a condition of her eligibility.⁸¹ This rule is representative of the government's attempts to diminish benefits or completely eliminate child support recipi-

One of the most common myths about welfare recipients is that their welfare dependency is unnecessary and that women seek additional pregnancies in order to receive higher benefits. *WELFARE OF CHILDREN*, *supra* note 73, at 11, 16. On the contrary, families on welfare average about the same number of children—2.2—as the rest of the population and, like all American families, they are getting smaller: between 1971 and 1977, the average welfare family decreased in size from 3.8 to 3.1. *Id.* at 16.

78. A. LAFRANCE, *supra* note 73, at 338. For a discussion of local inequities in enforcement of AFDC eligibility requirements, see Lupu, *Welfare and Federalism: AFDC Eligibility Policies and the Scope of State Discretion*, 57 B.U.L. REV. 1 (1977); Note, *Civil Liberties versus Governmental Interest: A Constitutional Context for the Impact of Title IV-D of the Social Security Act on Ohio Families in the Aid to Families with Dependent Children Program*, 5 CAP. U.L. REV. 245 (1976); Note, *Sex Discrimination in the Kentucky AFDC Program*, 15 J. FAM. L. 260 (1976-77).

79. The authority for home visits is found at 42 U.S.C. § 604(b)(1976).

80. *Wyman v. James*, 400 U.S. 309 (1971). The Supreme Court dealt with mandatory home visits in this case. The plaintiff had provided all necessary information to the welfare agency for a determination of her family's eligibility but refused to allow the caseworker to visit her apartment. Accordingly, AFDC benefits were terminated for her entire apartment. The recipient subsequently challenged the mandatory visit as a violation of her family's right to be free from unreasonable searches. The Court found it was not unreasonable even if it was a search. In his dissent, Justice Marshall stated:

Would the majority sanction, in the absence of probable cause, compulsory visits to all American homes for the purpose of discovering child abuse? Or is this Court prepared to hold as a matter of constitutional law that a mother, merely because she is poor, is substantially more likely to injure or exploit her children?

Id. at 342 (emphasis added).

81. 42 U.S.C. § 602(a)(26)(1976). See *In re Marriage of Shore*, 71 Cal. App. 3d 290, 139 Cal. Rptr. 349 (1977) (AFDC recipient must assign rights of child support to county agency rather than private collection agency); *State ex rel. Hansen v. McKay*, 31 Or. App. 631, 571 P.2d 166 (1977) (validity of assignment by mother of her support rights to the Public Welfare Division was controlled by state law). Formerly a recipient was also required to divulge the paternity of her child, even though the identity would have no bearing on benefits received. 42 U.S.C. § 602(a)(17)(A)(i)(1974) (repealed 1975). See *Doe v. Norton*, 365 F. Supp. 65 (D. Conn. 1973).

ents from the welfare rolls.⁸² A related intrusion is the welfare agency's compilation of extensive records on the private lives of recipients.⁸³ The AFDC program explicitly allows disclosure of private information to public officials in connection with their duties.⁸⁴

Women who choose to train for employment while receiving AFDC benefits encounter further impediments and discrimination. The Work Incentive Program (WIN)⁸⁵ is a training program created specifically to provide AFDC recipients with the means necessary to end welfare dependence. Although all recipients are required to register in the program,⁸⁶ WIN has been remiss in meeting its goals with respect to women recipients. First, women recipients are sometimes victimized because of their childcare needs. A mother receiving welfare benefits may be denied access to WIN because welfare officials find her childcare arrangements to be inadequate.⁸⁷ On the other hand, she may be

82. BABCOCK, *supra* note 30, at 770. A similar federal policy that impacts negatively upon AFDC recipients is the current child care policy which has created erratic and inadequate child care for women who have given up their rights to child support. Welfare reform bills introduced in the 95th Congress provide 'earned income disregards' which ultimately benefit the wealthy and leave poor parents with poor quality, poorly subsidized services. *Hearings on H.R. 9030 Before the Welfare Reform Subcomm. of the Comms. on Agriculture, Education and Labor, and Ways and Means, 95th Cong., 1st Sess. 43-46 (1977) (statement of the Children's Defense Fund).*

83. A. LAFRANCE, *supra* note 73, at 347.

84. 42 U.S.C. § 302(a)(7)(1976), *as amended by Act of Oct. 30, 1972, Pub. L. No. 92-603.*

Along with governmental interference with their private lives, AFDC recipients must also tolerate the stigma of public attitudes. A recent survey disclosed that five out of every eight respondents thought most welfare recipients could manage without public assistance. WELFARE OF CHILDREN, *supra* note 73, at 11. Many studies show that most welfare recipients want to work, and do work when possible, EMPLOYMENT AND TRAINING ADM'N, U.S. DEP'T OF LABOR, THE WORK INCENTIVE (WIN) PROGRAM AND RELATED EXPERIENCES: A REVIEW OF RESEARCH WITH POLICY IMPLICATIONS (1977), but still must contend with the myth that they are lazy. WELFARE OF CHILDREN, *supra*, at 12. Furthermore, despite the attention focused on the permanent welfare population, the majority of recipients move on and off welfare, depending upon the type and duration of employment available to them. *Id.* at 16.

85. 42 U.S.C. §§ 630-44 (1976).

86. 42 U.S.C. § 602(a)(19)(A)(1976).

87. 42 U.S.C. § 602(a)(19)(A)(1976):

(a) A state plan for aid and services to needy families must

...

(19) provide —

(A) that every individual, as a condition of eligibility for aid under this part, shall register for manpower ser-

compelled to register in WIN even though she believes available childcare is not adequate.⁸⁸ Second, WIN places only a small number of women in any jobs at all,⁸⁹ partly because Congress mandated that unemployed AFDC fathers are to receive priority.⁹⁰ Finally, WIN only trains women recipients for low-paying, female-intensive jobs, and thus assures their continued dependence on welfare.⁹¹

The increasingly penurious level of benefits⁹² motivates recipients to re-enter the labor market. However, the tax rates on earned income, and the reduction of benefits at a rate not replaceable by earned wages, serve to leave the working AFDC

vices, training, and employment as provided by regulations of the Secretary of Labor, unless such individual is — (v) a mother or other relative of a child under the age of six who is caring for the child; or (vi) the mother or other female caretaker of a child. . . .

(emphasis added).

88. U.S. COMM'N ON CIVIL RIGHTS, *WOMEN STILL IN POVERTY 2* (Clearinghouse Pub. No. 60) (1979) [hereinafter cited as *WOMEN IN POVERTY*]. "The key to moving some people off welfare is employment for the AFDC employable parent; but even training for employment, a first step, requires an expensive new industry—daycare—which now lacks organization, leadership, personnel, and money for construction of facilities." G. STEINER, *THE STATE OF WELFARE* 51 (1971).

89. In fiscal 1973, there were 356,000 registrants for WIN; 249,500 (70%) were women. Yet, of the 34,300 persons who found jobs and were removed from AFDC, only 14,000 (or 41%) were women. In fiscal 1975, the statistics were equally bleak. There were more than 839,000 WIN registrants during that period, of whom 177,271 obtained employment. *WOMEN IN POVERTY*, *supra* note 88, at 14-15.

90. "The Secretary, in carrying out [the WIN] program . . . , shall accord priority to such individuals in the following order, taking into account employability potential: first, unemployed fathers; second, mothers . . . who volunteer for participation under a work incentive program; third, other mothers, and pregnant women. . . ." 42 U.S.C. § 633(a)(1978).

91. Only 18% of WIN registrants earn enough income to take them off welfare. *WOMEN IN POVERTY*, *supra* note 88, at 2. For a discussion of the limitations and inequities of the WIN program, see Anderson, *WIN: From Both Sides Now*, 13 *CLEARINGHOUSE REV.* 584 (1979); Zall & Bethiel, *The WIN Program: Implications for Welfare Reform and Jobs Organizing*, 13 *CLEARINGHOUSE REV.* 272 (1979).

92. Welfare benefits have remained the same or increased a small amount. However, because of rises in the cost of living, the standards of living for welfare recipients are actually falling. For example, the average monthly payment per recipient in AFDC and GA programs increased \$3.93 and \$3.77, respectively, between late 1977 and late 1978. OFFICE OF RESEARCH AND STATISTICS, SOCIAL SECURITY ADMINISTRATION, U.S. DEP'T OF HEW, No. 6, *MONTHLY BENEFIT STATISTICS*, Table 6 (HEW Pub. No. 79-11703, 1979) [hereinafter cited as *MONTHLY BENEFIT STATISTICS*]. During the same period, though, the Consumer Price Index rose 16.6 points. *Id.* at Table 7. See *WOMEN IN POVERTY*, *supra* note 88, at 11, discussing worsening conditions for AFDC recipients due to inflation.

mother with a net loss of income.⁹³ Jobs with pay high enough to replace lost benefits are normally unavailable to recipients who possess few marketable skills. Moreover, wages for jobs requiring fewer skills may be artificially depressed because recipients willingly accept lower wages to remain eligible for benefits.⁹⁴

The welfare system thus maintains a continuing supply of low wage workers that consists primarily of women. A vicious cycle has been created whereby women, because of their marginal labor force participation and unequal position in marriage, are much more likely than men to enter the welfare system, from which they are fed back into the irregular economy.

Narrowly classifying cases as "on welfare" or "off welfare" has little utility except for administrative accounting. . . . The game of musical chairs played by new cases, previous cases that return, and cases that close for a while or for good reflects the interaction of the welfare system with the unstable employment conditions of the irregular, dead-end job economy available to them.⁹⁵

II. MIDYEARS WOMEN

A. DISPLACED HOMEMAKERS

Even if a woman choosing the traditional role of homemaker escapes the need for welfare in early adulthood, there is an increasing likelihood that in her midyears she will become a dis-

93. See charts and text regarding relative tax rates on welfare assistance at various income levels in R. LEVY, I. LEWIS & P. MARTIN, *CASES AND MATERIALS ON SOCIAL WELFARE AND THE INDIVIDUAL* 757-59 (1971). These materials illustrate the manner in which the relative tax rate increases tremendously, causing an actual loss at certain points as the family's income increases, thus creating a disincentive to work. See also A. LA-FRANCE, *supra* note 73, at 352-56.

94. It has been suggested that employers are motivated to lower wages below subsistence level because welfare will pay the difference between the earnings and a poverty line minimum. No free-market check exists on this practice because there is no scarcity of low wage workers, particularly women, and the inadequacy of welfare benefits motivates recipients to seek employment. Pearce, *supra* note 70, at 33. Cf. Sparer, *The Right to Welfare*, in *THE RIGHTS OF AMERICANS: WHAT THEY ARE, WHAT THEY SHOULD BE* 65 (N. Dorsen ed. 1970-71) (describing the manner in which the work requirements of welfare programs subsidize menial and poorly paid jobs). See Leffler, *Minimum Wages, Welfare, and Wealth Transfers to the Poor*, 21 J.L. ECON. 345 (1978) (regarding the correlation between minimum wages for low status employment and the necessity for large welfare rolls).

95. Carter, *supra* note 70, at 1.

placed homemaker and need such assistance. Displaced homemakers are women in their middle years who have devoted their time to homemaking and are displaced through divorce or the death of a spouse.⁹⁶ Displacement leaves these women with no source of support. If they seek work, they find that employers are often unwilling to credit work experience prior to marriage or any skills learned from activities outside the paid labor force. With outmoded job skills, no job contacts, and inadequate counseling, the displaced homemaker must often settle for low wage jobs that require no specialized training.⁹⁷ In 1975, the California Legislature expressly acknowledged the severity of the social and economic problems of displaced homemakers:

[T]hey . . . are very often without any source of income; they are ineligible for categorical welfare assistance; they are subject to the highest unemployment rate of any sector of the work force; they face continuing discrimination in employment because they are older and have no recent paid work experience; they are ineligible for unemployment insurance because they have been engaged in unpaid labor in the home; they are ineligible for social security because they are too young, and for many, they will never qualify for social security because they have been divorced from the family wage earner; they have often lost their rights as beneficiaries under employers' pension and health plans through divorce or death of spouse, despite many years of contribution to the family well-being; and they are most often ineligible for Medi-Cal, and are generally unacceptable to private health insurance plans because of their age.⁹⁸

The number of displaced homemakers, now estimated at two to three million,⁹⁹ will rise as divorces increase and women con-

96. Displaced Homemakers Act, CAL. GOV. CODE §§ 7320-7335 (West Supp. 1980). The Act also includes homemakers displaced due to other loss of family income, for instance, if her spouse is disabled.

97. WOMEN'S BUREAU, U.S. DEP'T OF LABOR, MATURE WOMEN WORKERS 1 (1976).

98. *Equal Opportunity for Women: Hearing Before the Subcomm. on Retirement Income and Employment of the House Select Comm. on Aging*, 92d Cong., 1st Sess. 17 (1975) (statement of Rep. Yvonne Brathwaite Burke).

99. Sommers & Shields, *Displaced Homemakers*, C.R. DIG., Win. 1978, 33, 34.

The number of displaced homemakers in this country is not ascertainable with current statistical indexes, because no ac-

tinue to outlive men.

Midyears women whose long-term traditional marriages end in divorce may face a particularly tragic fate.¹⁰⁰ Divorce can be a form of forced retirement for which they are often psychologically and economically unprepared.¹⁰¹ Many have performed unpaid work for a decade or more and may have sacrificed their own careers to be homemakers, yet are left with only the financial provisions of a divorce decree, all too often inadequate for the transitions these women must make.¹⁰²

No-fault divorce laws have exacerbated the situation, not because of the removal of the concept of fault, but because a facade of equality has been constructed when, in fact, the parties are in very unequal positions due to sex discrimination.¹⁰³

counting has ever been made of this segment of society. However, the following statistics begin to identify the large number and broad social spectrum of potential displaced homemakers. In 1975, 57% of married women were full-time housewives. During this same year, the Census Bureau reported that there were four million divorces and ten million widows in the population. Almost three million women who are not now in the labor force will lose federal assistance in the near future when their children reach majority. Among women between the ages of 35 and 64, about one million were unemployed in June, 1977, out of a national total of 6.7 million unemployed persons.

Hearings Before the Subcomm. on Employment, Poverty, and Migratory Labor of the Senate Comm'n. on Human Resources, 95th Cong., 1st Sess., 2 (1977) (testimony of Senator Gaylord Nelson).

100. See, e.g., *Abney v. Abney*, 374 N.E.2d 264 (Ind. Ct. App. 1978). The wife suffered from severe rheumatoid arthritis requiring costly medical treatment. She had received assistance through her husband's military benefits, but this assistance was terminated upon divorce.

101. See Sommers, *The Compounding Impact of Age on Sex*, C. R. Dig., Fall 1974, 3, 5, 8, 9 (describing the plight of the divorced midyears homemaker); Sommers & Shields, *supra* note 99, at 33-36. See also Frank, Berman, & Mazur-Hart, *No Fault Divorce and the Divorce Rate: The Nebraska Experience—An Interrupted Time Series Analysis and Commentary*, 58 NEB. L. REV. 1, 90-93 (1979) (describing discussion of the economic hardships of families upon dissolution); see Foster & Freed, *Divorce Reform: Brakes on Breakdown?*, 13 J. FAM. L. 443 (1973); see generally 12 TRIAL, April, 1976 (regarding economic hardships of families upon dissolution).

102. See Frank, Berman, & Mazur-Hart, *supra* note 101, at 70-71; Sommers, *supra* note 101, at 8-9; Sommers & Shields, *supra* note 99, at 34.

103. Sommers, *supra* note 101, at 8-9; Sommers & Shields, *supra* note 99, at 36. Cf. Frank, Berman, & Mazur-Hart, *supra* note 101, at 20-21 (discussing the significant increase in divorces of persons over 50 in Nebraska after adoption of no-fault divorce laws).

The legal system has only recently begun to acknowledge this dilemma.¹⁰⁴ In California, the Family Law Act was amended in 1979 to mandate judges sitting in dissolution cases to consider the effects of a homemaker's years out of the market upon her employability, when awarding spousal support.¹⁰⁵ Continued efforts will be required, however, to ensure that women who have accepted traditional dependency roles are not legally and financially stranded later in life.

Widows, like women divorced in their midyears, often lack recent work histories and may be unable to generate the income needed for survival. A substantial inheritance is rarely a resource upon which a widow can rely. Although life insurance is generally the source of a widow's inheritance, it has been determined that a majority of widows receive less than \$5,000 in proceeds¹⁰⁶ — an amount barely enough to cover funeral costs, much less support a family for any period of time. Any inheritance a widow does receive may be decimated by inheritance taxes.¹⁰⁷ Further, a widow cannot necessarily rely on Social Security because she may face the "widow's gap". She is ineligible for Social Security survivor's benefits unless she has minor children, and once the youngest reaches eighteen years of age the dependency benefits cease until she turns sixty.¹⁰⁸

104. For example, the Displaced Homemakers Act, CAL. GOV. CODE §§ 7320-7335 (West Supp. 1980), enacted in 1978, affords training to those homemakers displaced because of divorce or death of spouse. Further, the Community Employment and Training Act Amendments of 1978 specifically target displaced homemakers as a group with special employment and training needs. 29 U.S.C. § 301(b)(1)(A)(1979).

105. 1979 Cal. Stats., ch. 912.

106. Law, *Measuring the Pay-Off on Your Life Insurance*, 5 WOMEN'S WORK 11, 12 (1978).

107. For example, a woman who inherited the ranch she and her husband had worked together for 33 years expected no problems in the transfer as it was in both their names. However, she learned she would have to pay a large amount of federal inheritance tax. Unless she could prove she had contributed money to the purchase or improvement of the ranch, it was considered to belong entirely to her husband (after standard and marital deductions). In contrast, had she died first, her husband would pay no inheritance tax. Thus, widows are placed in the predicament of selling inherited assets to pay taxes because their non-monetary contributions are not recognized. NAT'L COMM'N ON THE OBSERVANCE OF INT'L WOMEN'S YEAR, . . . TO FORM A MORE PERFECT UNION . . . , 13 (1976).

108. 42 U.S.C. § 402(e)(1)(B) (1976). An important development is Congress's directive to the Department of HEW in the Social Security Amendments of 1977, Pub. L. 95-216, to study proposals for elimination of dependency as a factor in entitlement to spouse's benefits. The Department reported the results of its study in SOCIAL SECURITY AND THE CHANGING ROLES OF MEN AND WOMEN (1979). One suggestion in the report for

B. MIDYEARS WOMEN IN THE LABOR FORCE: SEX AND AGE DISCRIMINATION

Midyears women already in the labor force, as well as newly-entering displaced homemakers, face age discrimination in addition to the sex discrimination experienced by younger women. The fact that older women generally experience longer periods of unemployment is an unfortunate indication of the added impact of age discrimination. In 1975, the average period of unemployment for women aged sixteen to forty-four who were seeking work was 11.4 weeks, while for women age forty and over, it was 17.7 weeks.¹⁰⁹

Employers occasionally refuse to hire midyears women because they fear such workers will resent a younger boss or will be a drain on company retirement and medical plans.¹¹⁰ Often employers exclude midyears and older women from consideration because they are "overqualified".¹¹¹ Yet, should a woman have little paid experience, she is regularly rejected because of her lack of recent work experience.¹¹² Once they are hired, midyears and older women may find that prospects for advancement are nonexistent,¹¹³ and that they are consistently underpaid.¹¹⁴ Men's earnings rise sharply from post-school years through their twenties and thirties, peak in their mid-forties and decline somewhat thereafter.¹¹⁵ In contrast, women's earnings remain relatively static and, on the average, peak at about age thirty.¹¹⁶

reducing reliance on dependent's benefits for adults was payment of benefits to surviving parents only until the youngest child reaches age seven, rather than the present age 18. *Id.* at 41. The Report further suggested a one year adjustment benefit to make up partially for this benefit loss. *Id.* Lowering the age of dependent children so drastically for survivor benefits eligibility makes the widow's gap a chasm. Without a more realistic period of adjustment benefits, such a decrease in age for eligibility would cause an even greater incidence of poverty in households headed by unmarried women.

109. WOMEN'S BUREAU, U.S. DEP'T OF LABOR, MATURE WOMEN WORKERS 3 (1976).

110. L. POGREBIN, GETTING YOURS 154 (1975).

111. *Id.*

112. Sommers, *The Compounding Impact of Age on Sex*, C.R. Dig., Fall 1974, 3, 7.

113. Employers prefer to invest time and money in training younger employees because they feel there is a better return on their investment. L. POGREBIN, *supra* note 110, at 154.

114. Employers tell midyears women that entry level pay is low because they have a lot of catching up to do, but wages remain low even after years of employment. *Id.*

115. BARRETT, *supra* note 45, at 36. Barrett compares in detail the life-cycle earning of women and men. *Id.* at 36-46.

116. *Id.* at 36.

The Age Discrimination in Employment Act (ADEA)¹¹⁷ prohibits employment discrimination based on age. Thus far, however, the ADEA has been of limited help to midyears and older women. Women experience age discrimination at an earlier age than men,¹¹⁸ but ADEA coverage does not begin until age forty.¹¹⁹ Further, the combination of sex and age discrimination that older women experience is subtle.¹²⁰ Because there is no re-

117. 29 U.S.C. §§ 621-634 (1976 & Supp. II 1978). Section 623 of the Age Discrimination in Employment Act provides in part:

(a) Employer practices

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

(b) Employment agency practices

It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

(c) Labor organization practices

It shall be unlawful for a labor organization—

(1) to exclude or expel from its membership, or otherwise to discriminate against, any individual because of his age;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

118. L. POGREBIN, *supra* note 110 at 152; Telephone interview with Gale Bosche, Investigator, Age Discrimination Unit, Equal Employment Opportunity Comm'n, in San Francisco, California (Mar. 21, 1980).

119. 29 U.S.C. § 621 (1978).

120. "Detecting and proving age discrimination was, and continues to be, a subtle matter requiring diligence, imagination, and painstaking investigation." EMPLOYMENT STANDARDS ADMINISTRATION, U.S. DEP'T OF LABOR, AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967, at 5 (1978) [hereinafter cited as ADEA REPORT.] Detection and proof of age discrimination directed against midyears and older women is even more difficult. The most convincing evidence of such discrimination would be afforded in an overview of the experiences faced by thousands of midyears and older women, but that kind of data fails

quirement that employers keep records cross-tabulated by sex and age, a persuasive statistical showing of discrimination is difficult, is not impossible, to make. Finally, procedural requirements pose a great barrier to successful litigation under the ADEA.¹²¹

C. GENERAL ASSISTANCE

General Assistance (GA) is the only welfare resource for midyears women without young children.¹²² Administered at the county or state level, GA serves poor people who are ineligible for AFDC or SSI.¹²³ As a rule, the eligibility requirements for

to prove discrimination by any single employer. See Comment, *Age Discrimination in Employment*, 8 Loy. Chi. L.J. 864, 871-77 (1977); Comment, *1967 ADEA and Preemption: A Case for Broader State Laws*, 12 U.S.F. L. Rev. 283, 292-94 (1978).

121. As of 1977, approximately half of all private suits pursuant to the ADEA were being dismissed on procedural grounds, without hearing on the merits. ADEA REPORT, *supra* note 120, at 13. The ADEA was amended in 1978 in part to cure this problem. *Id.*

122. SSI and AFDC are the welfare niches for the recognized poor — the blind, disabled, aged, or children. GA picks up others who are alcoholics, have personality disorders, or some other incapacitating, but not disabling complaint. The only group of healthy (mentally and physically) GA applicants are newly displaced homemakers.

The standards for evaluating 'disability' under SSI and the Social Security Act are stringent. An individual is disabled for purposes of SSI only if she suffers from a physical or mental impairment which can be expected to result in death, or which has lasted or can be expected to last for a continuous period of not less than twelve months, and which is of such severity that she cannot perform any substantial gainful work which exists in the national economy. 42 U.S.C. § 1382c(a)(3)(B) (1976). The Secretary of HEW has promulgated regulations, contained at 20 C.F.R. §§ 416.901-.985, which interpret the term 'disability' as used in the Social Security Act and set forth standards for its evaluation. The regulations direct a finding of no disability in the case of a person 55 years of older who is limited to sedentary work as a result of severe medically determinable impairments, and who has a seventh grade education, where her previous work experience was semi-skilled and the skills are considered transferable. See 20 C.F.R. Part 416, Subpart 1, app. 2, Rule 201.00-.03.

Similarly, courts have interpreted strictly the degree of severity necessary before a condition is considered disabling within the meaning of the Act. See, e.g., *Jolley v. Weinberger*, 537 F.2d 1179 (4th Cir. 1976) (plaintiff in her sixties whose principal occupation was waitress had operation including a hiatus hernia repair, vagotomy, pyloroplasty and gastrostomy. Since the operation she had complained of vomiting, diarrhea, stomach pains, blackout spells, chest pains, bursitis in right arm, phlebitis in left leg, shortness of breath, poor grip in right hand, poor appetite, and insomnia. She also experienced nervous tension and depression. Held, no disability). See also *Deyo v. Weinberger*, 406 F. Supp. 968 (S.D.N.Y. 1975); *Chunco v. Weinberger*, 405 F. Supp. 1159 (S.D. W.Va. 1975).

123. Local welfare programs, called variously General Assistance, General Relief, Relief, or Indigent Aid, are vestiges of traditional poor laws. B. BRUDNO, *POVERTY, INEQUALITY AND THE LAW* 490 n.e (1976). For a comparison of the approach of General Assistance to that of the Social Security Act of 1935, see *Wedemeyer & Moore, The American Welfare System*, 54 U. CALIF. L. REV. 326, 356-66 (1966). For an examination of California's approach to General Assistance, see Comment, *Variance in California's General*

GA are far stricter than those of either AFDC or SSI.¹²⁴ Eligibility requirements and benefit levels are subject to variation from state to state and county to county.¹²⁵

GA programs provide no job training, although many do have work requirements.¹²⁶ GA recipients are typically divided into two groups: employables and unemployables.¹²⁷ Those con-

Assistance Welfare Roles: A Dilemma and a Solution, 13 SANTA CLARA L. REV. 304 (1972).

124. B. BRUDNO, *supra* note 123, at 490 n.e.; A. LAFRANCE, *supra* note 73, at 265-66, 290. For example, an individual may own a home and up to \$1500 in resources and retain her eligibility for SSI. See note 187 *infra* and accompanying text. In contrast, many counties in California (44 of 58) require GA recipients to sign liens on their home, and most permit recipients to sign liens on their homes, and to retain a smaller amount of personal property (for example, Contra Costa: \$500 non-liquid assets; Kings: \$50; Marin: \$600; Modoc: None). SPECIAL PUBLIC HEARING RELATING TO A STATE GENERAL ASSISTANCE PROGRAM, CALIFORNIA ASSEMBLY COMM. ON HUMAN RESOURCES, app. V (1977) [hereinafter cited as GENERAL ASSISTANCE HEARING].

In 1975, California Rural Legal Assistance reported on the inadequacies created by local administration of General Assistance. One shortcoming was the suffering individuals had to endure meeting the very strict eligibility requirements. For example, a 49 year old woman in Madera County could not qualify for GA until her utilities were shut off for lack of payment. Another woman could not qualify for GA until she received a foreclosure on her property. As a consequence, she was without utilities during the winter months. Letter from California Rural Legal Assistance to staff (Nov. 10, 1975) (case histories of GA recipients).

125. Variations result from the fact that these programs are governed by local ordinance, state statute, or both, and financed by local property taxes or some combination of state and local revenues. B. BRUDNO, *supra* note 123, at 490 n.e. For a discussion of variations in benefit levels and eligibility requirements, see A. LAFRANCE *supra* note 73, at 265-66.

In California, GA is maintained solely through county funds. CAL. WELF. & INST. CODE §§ 17000-17409 (West 1978). Section 17000 makes it the duty of every county to provide GA regardless of availability of funds. Each county board of supervisors sets the amount of assistance that will be granted to eligible persons in their county. See Comment, note 123 *supra*, at 304 (regarding the powers and duties of individual counties in setting General Assistance benefit levels).

126. See generally A. LAFRANCE, *supra* note 73, 359-61. Twenty-eight of California's 58 counties have some form of work requirement. Attachment to letter from Dep't of Social Welfare, County of Sacramento (Nov. 13, 1979) (regarding its telephone survey of GA programs in California counties) [hereinafter cited as Welfare Dep't letter].

127. Some counties define the category of employable persons broadly. The following describes the guidelines used by Santa Clara County, California:

[A]ll alcoholics and drug addicts are considered employable. 'Language barrier and/or educational level will not be considered cause for assessment as unemployable.' Once the above described persons are determined to be employable, then as a condition of their eligibility they are required to participate in a so-called 'work project' and also contact six possible employers every week. They are also required to meet their vocational worker, twice a month. . . . If they miss two appointments

sidered employable are compelled to accept available employment, even if it is menial or pays less than minimum wage.¹²⁸ In many counties, this means midyears women may be required to perform live-in domestic work, literally working for room and board, and, as a consequence, become ineligible for GA.

One county has recognized the plight of midyears women in its definition of unemployables. While normally a GA recipient must be physically or mentally incapable of working to be considered unemployable, Contra Costa County in California has created the classification of vocationally disabled. This category includes those considered incapable of working because of lack of experience or training,¹²⁹ and is filled overwhelmingly by midyears women.¹³⁰ Although the program fails to offer recipients aid to overcome their vocational disability, the GA program of Contra Costa County at least acknowledges their employment dilemma.

Even if a midyears woman meets the tough eligibility requirements for GA, the benefits she receives are appallingly low.¹³¹ Numerous efforts have been made to place local welfare

with their vocational worker or miss three days on the work project, their GA benefits will be terminated for the period of six months.

GENERAL ASSISTANCE HEARING, *supra* note 124, at 75 (statement of Kevin Aslanian).

128. See also SPIRIT OF HOUSTON, *supra* note 19, at 96 (warning of work requirements associated with welfare programs that pay poorly, do not have the fringe benefits or collective bargaining rights of regular employment and have little or no provision for skill development or training).

129. GENERAL ASSISTANCE HEARING, *supra* note 124, app. IV, at 115.

130. In Contra Costa County, women comprise about 40% of the unemployables category, but only about 25% of the employables category. This is in large part due to the "vocational unemployability" of many midyears women. In their 50's or 60's, these women typically have no job experience or skills. Telephone Interview with Bill Reid, Social Service Dep't, Contra Costa County. (Nov. 19, 1979).

131. The national average payment to a GA recipient is \$128.11 per month. MONTHLY BENEFIT STATISTICS, *supra* note 92, at Table 6. The monthly GA grants of 23 of California's 58 counties are \$150 or less for an individual. Welfare Dep't Letter, *supra* note 126.

California Rural Legal Assistance and the Western Center on Law and Poverty brought suit in response to our client's urgent concerns regarding the starvation GA grant levels in most counties in this state. We became tired of hearing the endless parade of atrocities that clients had to live through. People sleeping in their cars, in open fields, in tool sheds, people who couldn't afford to sleep in heated rooms, people who were bit-

programs under the federal government so that benefits would be raised and eligibility requirements standardized.¹³² The latest welfare reform proposal by the Carter administration, however, fails to address these problems.¹³³

III. OLDER WOMEN

Many women spend their retirement-age years in poverty as a culmination of dependency and discrimination. Women often find that advancing age means graduation from one welfare system to another, whether as life-long homemakers deprived of sharing in their husbands' pensions because of divorce or widowhood,¹³⁴ or as women workers excluded from pension benefits based on their own employment history.¹³⁵ Poverty for women in old age is a progressive matter — the older they get, the smaller their income becomes relative to younger women and to men of the same age.¹³⁶

ten by rats, people who had to give their blood in skid row blood banks on the average of once or twice every week in order to get enough money to eat.

GENERAL ASSISTANCE HEARING, *supra* note 124, at 55-56 (statement of Dorothy Lang). See note 124 *supra* and accompanying text regarding the variation in benefit levels among local welfare programs.

132. SSI was created for this very reason—to bring some regularity and continuity to the chaos of state old age assistance programs. Chang, *The Supplemental Security Income Program: The 'Revolution' Needs Reform*, 62 CORNELL L. REV. 314 (1977). SSI "established uniform eligibility requirements, eliminated some of the worst aspects of old welfare systems, and gives states strong financial incentives to supplement the basic grants." *Id.* at 314.

133. In May 1979, President Carter introduced H.R. 4321, 96th Cong., 1st Sess. The Ways and Means Subcommittee on Public Assistance and Unemployment Compensation amended and approved the bill on July 23. (The bill was reintroduced in amended form as H.R. 4904, 96th Cong., 1st Sess.) The bill, as approved by the Ways and Means Committee, retains the existing welfare structure, including AFDC, SSI and Food Stamps. The major changes would establish a minimum benefit level for all recipients, and would extend eligibility to two parent families whose principal wage earner is unemployed. The problems raised by GA programs are not addressed. On Nov. 7, 1979, the bill passed the House on a roll-call vote. 125 CONG. REC. H10,284 (daily ed. Nov. 7, 1979) It is presently being considered by the Senate Committee on Finance. [1979-1980] 2 CONG. INDEX (CCH) ¶ 935,030

134. See notes 137-153 *infra* and accompanying text.

135. See notes 158-177 *infra* and accompanying text. For further discussion of pension inequities, see in this issue Leonard, *Catch 22: Women and Pensions*, 10 GOLDEN GATE U.L. REV. 1191 (1980).

136. The median income for unmarried women over age 85 is only two-thirds that of the already meager income of the unmarried women aged 65-69, and the gap between men and women increases at age 65 and over; the average income of unmarried women is 85% that of unmarried men, but at age 80 and over, the figure drops to 80%. Address by Mollie Orshansky, author of the Federal Poverty Index, Western Gerontological Society

A. HOMEMAKERS: DEPENDENCY BENEFITS

Pensions—Dissolution

When a long-term marriage ends, the two major assets subject to division are usually a family home and a pension fund. Yet, private pensions, unlike Social Security, do not automatically provide benefits to the divorced wife.¹³⁷

Presently, a divorced woman may receive a portion of the pension asset through an award of spousal support or through the property settlement. Awarding spousal support is within the discretion of the court,¹³⁸ but, as noted above, the number of awards is decreasing.¹³⁹ Further, an award is no guarantee that the income due from the pension asset will actually be paid. Whether a divorced spouse has a basis for including the pension in the property settlement depends upon the relevant state law, and state laws regarding the division of marital property vary widely.¹⁴⁰ In California, even unvested pension rights are generally considered property of the marital community and subject to division upon dissolution.¹⁴¹

Symposium (May 1, 1979) [hereinafter cited as Orshansky Address].

137. Legislation has been introduced to remedy this situation. H.R. 2817, 96th Cong., 1st Sess. (1979), H.R. 2818, 96th Cong., 1st Sess. (1979), and H.R. 2857, 96th Cong., 1st Sess. (1979), amend the military, federal civil service and foreign service retirement systems, respectively, by creating dependency benefits for spouses in marriages ten years or longer. The bills are based on the premise that because marriage is an economic partnership, with the homemaker spouse enhancing the worker spouse's earning capacity, she should share in the retirement benefits. While the legislation does not encompass all pensions, it will serve as a model for further reform in this area. H.R. 2817 is pending in the Armed Services Committee. [1979-1980] 2 CONG. INDEX (CCH) ¶ 28,294; H.R. 2818 in the Post Office and Civil Service Committee, *id.*, and H.R. 2857 in the Foreign Affairs and Post Office and Civil Service Committees, *id.* ¶ 28,296.

138. CAL. CIV. CODE § 4801 (West Supp. 1980) is typical in its use of the discretionary "may": "[T]he Court may order a party to pay for the support of the other." *Id.* 139.

139. See notes 26-27 *supra* and accompanying text.

140. The Congressional Research Service of the Library of Congress found that "some states do not give divorce courts jurisdiction to divide marital property. Other states use a title theory of division. Some states provide for equitable division of property. Yet other states are community property states. Some states consider retirement benefits to be property." CONGRESSIONAL RESEARCH SERVICE, REPORT NO. 79-202, WOMEN AND RETIREMENT INCOME PROGRAMS: CURRENT ISSUES OF EQUITY AND ADEQUACY, at XVIII (1979) [hereinafter cited as WOMEN AND RETIREMENT INCOME].

141. See, e.g., *In re Marriage of Brown*, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976). An exception to the general rule was carved out for Railroad Retirement benefits in *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979). There the United States Supreme Court held that Railroad Retirement benefits are not community property and therefore not subject to equal division by California courts. *Id.* at 591. Advocates initially

Another issue of importance is the status of survivor's benefits as an asset to be divided upon divorce. Even the California courts, which generally have the most far-reaching interpretations regarding retirement income received while the worker spouse is alive, do not recognize any community property interest in survivor's benefits.¹⁴²

Pensions—Widowhood

The middle-aged homemaker faces a high risk of losing pension coverage if her spouse dies in his pre-retirement years. The Employee Retirement Income Security Act (ERISA),¹⁴³ enacted by Congress in 1974 to set standards for private pension plans, fails to protect older women. ERISA permits the forfeiture of survivor's benefits if the worker dies within a year or two of retirement.¹⁴⁴ This occurs even when the worker's rights have fully vested in the retirement plan. Some pension plans may contain an option protecting against this event.¹⁴⁵ However, election of this option greatly reduces the pension benefits even if the worker survives to retirement.¹⁴⁶

Furthermore, the retiring worker alone controls the decision whether survivor's benefits will be given at all after retirement.¹⁴⁷ The wife need never be informed of the decision, much less asked to ratify it. Pension plans must offer retirees a joint and survivor's annuity option, as well as a single life annuity option.¹⁴⁸ The single life annuity provides full benefits ending at

feared that the Court would apply a rationale similar to that in *Hisquierdo* to find no community interest in other pension plans. However, the Court took summary action on two cases making just such an argument. No. 78-1422, *Retirement Fund Trust of the Plumbing, Heating & Piping Indus. v. Johns*, *appeal dismissed, cert. denied*. 48 U.S.L.W. 3447 (Jan. 15, 1980); No. 78-1881, *Carpenter's Pension Trust Fund v. Campa*, *appeal dismissed, id.*

142. *In re Marriage of Lionberger*, 97 Cal. App. 3d 56, 158 Cal. Rptr. 535 (1979).

143. Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1381 (1976).

144. 29 U.S.C. § 1055(b) (1976).

145. *Id.*

146. *Id.*

147. 29 U.S.C. § 1055(c)(1) (1976). Mandatory survivor benefits are rare. See *WOMEN AND RETIREMENT INCOME*, *supra* note 140, at 57-65.

148. Prior to the enactment of ERISA, a worker was automatically awarded a single-life annuity when he retired. If a joint and survivor's annuity was available at all the worker had to explicitly request inclusion in that option. ERISA has reversed this by compelling private plans to award a joint and survivor's benefit of at least one half of the retiree's benefits, unless the worker rejects the option in writing at retirement time. 29

the retiree's death. A joint and survivor's annuity provides a reduced amount during the retiree's lifetime, and pays a yet smaller portion to his survivor.¹⁴⁹

The worker is tempted to elect the higher income of the single life annuity, leaving nothing for his survivor. For example, more than sixty-four percent of civil service employees,¹⁵⁰ thirty-one percent of foreign service employees,¹⁵¹ and ninety-five percent of military personnel¹⁵² have chosen single life annuities over joint and survivor's annuities. The pension benefits provided by single life and joint and survivor's annuities should be equalized to avoid this temptation.¹⁵³

Social Security Benefits

The dependency status of homemakers under the Social Security Act of 1935¹⁵⁴ renders many older women economically vulnerable, especially in the case of divorce. Divorced women are eligible for dependency benefits only if married to the same person for ten years or more.¹⁵⁵ A woman cannot receive dependency benefits, however, until her ex-husband chooses to begin receiving his worker's benefits.¹⁵⁶ If he is younger than she, or elects to continue working, the divorced woman has no recourse. One possible remedy for this inequity is the concept of earnings sharing, whereby the total earnings of the marital unit are divided equally between the two spouses for purposes of Social Se-

U.S.C. § 1055(e) (1976).

149. For a description of annuities, see R. BILDERSEE, *PENSION REGULATIONS MANUAL: ANALYSIS, FORMS, AND PROCEDURES* (1975).

150. Fact Sheet (1979), issued by the Office of Congresswoman Patricia Schroeder (D. Col.).

151. *Id.*

152. *Id.*

153. While equalizing the benefits paid under the two types of annuities would raise the costs of pension plans, such a result would seem to be suggested by the Supreme Court's criticism of sex-based actuarial tables in *Manhart v. City of Los Angeles*, 436 U.S. 702 (1978). For a discussion of this case, see notes 176-77 *infra* and accompanying text. Further, the differential between the two annuities may be vulnerable to an equal protection challenge as discrimination based on marital status. Until the work of homemakers is recognized as economically valuable and pension worthy, equity demands such a result.

154. 42 U.S.C. § 402(b) (1975).

155. *Id.* § 402(b)(1)(G).

156. *Id.* § 402(b)(1).

curity eligibility.¹⁵⁷

B. OLDER WOMEN WORKERS

Continuing Discrimination on the Job

Employment discrimination against older women is pervasive in today's job market.¹⁵⁸ Older women confront the same prejudices facing midyears women but in a more extreme form.¹⁵⁹ Because of the severe discrimination, even older women with long working careers and extensive skills may find themselves shut out. "To put it baldly, the older women, by and large, have *no* labor force status. . . ."¹⁶⁰ The number of older women in the labor force has consistently comprised fewer than ten percent of all older women.¹⁶¹

Inadequate attention has been given to employment issues relating to older women.¹⁶² In part, this is due to the limited recognition of bias against older workers generally. For example, until recently the ADEA protected persons only until age sixty-five.¹⁶³ Another significant reason is that women are "de-sexed" at age sixty-five or earlier; employers and the government tend to maintain statistics broken down by age or by sex, but seldom

157. For a comprehensive discussion of earnings sharing, and how this concept could be integrated into our present Social Security system, see U.S. DEP'T OF HEW, *SOCIAL SECURITY AND THE CHANGING ROLES OF MEN AND WOMEN* (1979).

158. NATIONAL SENIOR CITIZENS LAW CENTER, *LEGAL ISSUES AFFECTING THE OLDER WOMAN IN AMERICA TODAY* 11, *citing* APPENDIX TO THE HOUSE SELECT COMMITTEE ON AGING HEARINGS ON THE PENSION PROBLEMS OF OLDER WOMEN 31 (1975). However, discrimination against older women in the labor market continues to hamper their economic independence. See Dappelt, *Retirement Plan Exemption in the ADEA of 1967: Will the Exceptions Swallow the Rule?* 53 CHI.-KENT L. REV. 597 (1977); Reid, *The First Ten Years of the ADEA*, 4 OHIO N.L. REV. 748 (1977).

159. See notes 109-121 *supra* and accompanying text. Women ages 55-64 are unemployed at almost three times the rate of men ages 55-64. However, women 65 and over are unemployed at eight times the rate of men 65 and over. E. MEIER, *AGING IN AMERICA: IMPLICATIONS FOR EMPLOYMENT* 4 (1976).

160. P. STEINER & R. DORVMAN, *THE ECONOMIC STATUS OF THE AGED* 60 (1957).

161. The number of older women in the labor force rose slightly from eight percent of all older women in 1900 to ten percent in 1950; since 1950 it has dropped to eight percent in the 1970's. DEP'T OF HEW, *AMERICANS* 1978, 7 (1978).

162. One of the few discussions of age discrimination in employment which considers the added impact of race and sex is E. MEIER, *supra* note 159.

163. In 1978 the ADEA was amended to extend coverage to all persons between the ages of 40 and 70. Act of Apr. 6, 1978, Pub. L. No. 95-256, §1, 92 Stat. 189 (codified at 29 U.S.C. § 621 (Supp. II 1978)).

cross-referenced.¹⁶⁴ Further, women are seen as senior citizens, rather than as workers subject to a combination of sex and age discrimination. Research is greatly needed to assess and document the specific employment concerns of older women.

Pensions

Few women acquire pension rights from their own employment.¹⁶⁵ One reason is that pension plans exist mainly in male-dominated occupations such as manufacturing, construction, utilities, and finance.¹⁶⁶ Pension plans are not found in private household employment (where ninety-seven percent of the workers are women), in most service jobs (where sixty percent are women), or in clerical jobs (where seventy-four percent are women).¹⁶⁷ Where pension plans are common, they reward the long-term, steady worker who has low mobility and high earnings.¹⁶⁸ To the extent women's employment patterns deviate from this model, they are denied opportunities to earn pensions. Further, pension plans are cost-computed on insurance principles; the cost of the plan decreases as the number of forfeitures increases.¹⁶⁹ Thus, to the degree women and lower paid men

164. Sommers, *supra* note 101, at 7 discusses this phenomenon. "At the magic figure of 65, women are lost in the sexless classification of senior citizens for all intents and purposes. Suddenly we disappear even from the concerns of civil rights activists. . . . The problem is no longer seen as one of 'sex', but as one of 'age.' But can the two be separated, anymore than sex and race?" *Id.* See OLDER WOMEN'S LEAGUE EDUCATIONAL FUND, *HOW TO TAME THE CETA BEAST* 5-6, 57-58 (1979) [hereinafter cited as *HOW TO TAME THE CETA BEAST*] for a discussion of the lack of cross-classification of statistics by age and sex in programs authorized by the Comprehensive Employment and Training Act (CETA).

165. *Hearings on Economic Problems of Women Before the Joint Economic Comm.*, 90th Cong., 2nd Sess. (1973) (statement of Merton C. Bernstein), cited in SENIOR ADULTS LEGAL ASSISTANCE, *AGING AND THE LAW*, PART VIII: LEGAL PROBLEMS OF OLDER WOMEN 114 (1978) [hereinafter cited as *AGING AND THE LAW*]. More than twice as many men as women reported participation in private pension plans in 1970. *Id.*

166. *AGING AND THE LAW*, *supra* note 165, at 114.

167. *Id.*

168. S. KATTELBAUM, *supra* note 16, at 15. Historically, pensions were gratuities, and the employer was free to establish conditions of eligibility and to discontinue payments at any time, for any reason, or for no reason. *Id.* at 16. Benefits were not offered to anyone except employees toward whom the employer felt obligated because of long and faithful service. *Id.* Since 1950, pensions have become regulated in terms of eligibility and payment obligations, but their nature has remained largely unchanged: eligibility is still based on length of uninterrupted service until retirement age. *Id.* at 17.

169. For a discussion of these principles, see R. BILDERSEE, *supra* note 149.

[T]he costs of pensions . . . could be greater than even alarmists . . . indicate. It is a consequence . . . of the growing long-

have been foreclosed from various pension programs, they subsidize the few who do obtain pensions. A Senate Labor Subcommittee found that only four percent of all pension plan participants actually qualified for benefits; in pre-ERISA plans, requiring eleven or more years for vesting, ninety-two percent had nothing to show for their participation.¹⁷⁰

ERISA, hailed as a large advance in this area,¹⁷¹ merely provides a minimal standard that plans must meet, based on traditional pension values which penalize women. For example, ERISA allows employers to omit from pension coverage employees under twenty-five years of age,¹⁷² and generally, those within five years of the plan's retirement age.¹⁷³ Further, part-time employees may be excluded from coverage,¹⁷⁴ and minimum vesting periods may be up to ten years in length.¹⁷⁵ Thus, almost any way a woman pursues a career while maintaining her family responsibilities has the effect of foreclosing her from the pool of future pension beneficiaries.

The use of sex-based actuarial tables also has an adverse effect on women workers. However, in *Manhart v. City of Los Angeles*,¹⁷⁶ the use of such tables to justify increased pension contributions from women's paychecks was struck down by the

term attachment of women to the labor force. At one time women were primarily temporary sojourners in the world of work; at best, they entered and left the labor force and frequently changed employers. This kept pension costs down and/or made possible the larger-than-otherwise benefits paid to those employees (primarily men) who did remain long enough to gain entitlement to pension payments upon retirement.

H. SHEPPARD & S. RIX, *THE GRAYING OF WORKING AMERICA: THE COMING CRISIS IN RETIREMENT-AGE POLICY* 132 (1977).

170. AGING AND THE LAW, *supra* note 165, at 115 (statement of Merton C. Bernstein).

171. 29 U.S.C. § 1001-1400 (1976). "[ERISA] represented a milestone in the development of this country's retirement income policies." Woodruff, *President's Commission Seeks Equitable Retirement Policy*, PENSION RIGHTS CENTER, RETIREMENT INCOME 12 (1979) (available from Pension Rights Center, Rm. 1019, 1346 Conn. Av., N.W., Washington, D.C. 20036)

172. 29 U.S.C. § 1052(a)(1)(A)(1) (1976).

173. *Id.* § 1052(a)(2)(B).

174. *Id.* § 1052(a)(3)(A).

175. *Id.* § 1053(a)(2)(A).

176. 436 U.S. 702 (1978).

United States Supreme Court.¹⁷⁷

Social Security Retirement Benefits

Sex discrimination in employment results in sex discrimination in retirement. Since Social Security is an earnings replacement system, the benefit formula is based upon earnings.¹⁷⁸ Thus, exclusion from higher paying jobs continues to haunt older women. After a lifetime of hard work at low-paying, often exploitative jobs, a woman can retire at age sixty-five to receive the minimum payment.¹⁷⁹ Although Social Security benefits are weighted in favor of low-income workers, this still fails to compensate for a lifetime wage differential.¹⁸⁰ In addition, women are further penalized by Social Security for the time they are out of the work force bearing and raising children, a factor which compounds the effect of low pay. The benefit formula is based on an average of life-time earnings,¹⁸¹ eliminating only the five lowest years,¹⁸² so that each additional year out of the paid

177. *Id.* at 716-17. Because the majority of private plans do not require employee contributions, the apparent victory is limited. The Court expressly did not decide whether the use of sex-based actuarial tables to reduce a pension when received was prohibited. *Id.* at 717-18. Lower courts have not been consistent in their interpretation of the *Manhart* holding. In *EEOC v. Colby College*, 589 F.2d 1139 (1st Cir. 1978), the defendant college made equal contributions to its retirement plan for male and female employees. However it provided smaller annuity payments to its female employees because of the use of sex-segregated mortality tables. The First Circuit remanded the case to the district court for reconsideration in light of *Manhart*. *Id.* at 1143-45. *But see* *Sobel v. Yeshiva Univ.*, 477 F. Supp. 1161, 1165-66 (S.D.N.Y. 1979), distinguishing *Manhart* and upholding a retirement plan which provided unequal benefits to male and female former employees.

178. 42 U.S.C. § 415(b)(1) (1976).

179. In 1976 the lowest benefit payable was \$93.80 monthly as the primary insurance amount and the maximum family benefits available were \$140.80 for an average monthly lifetime wage of \$76.00. 42 U.S.C. § 415(a)(3) (1976).

180. 42 U.S.C. § 415(b)(1) (1976). The law contains a provision whereby persons who have worked in jobs covered by Social Security for many years, but at rather low earning levels, can qualify for a special benefit that is somewhat higher than that available to them under the regular benefit computation provisions of the law. Commerce Clearing House, *SOCIAL SECURITY AND MEDI-CARE EXPLAINED* 124 (1977). The special minimum benefit is computed by multiplying nine dollars times the number of years of coverage over ten and less than 30. Nevertheless, a person currently needs at least 22 years of Social Security coverage to benefit from this provision because the minimum benefit for fewer years coverage under the regular provisions of law is greater than the special minimum. *Id.*

181. 42 U.S.C. § 415(b) (1976).

182. *Id.* § 415(b)(2)(A). *See* Griffiths, *Sex Discrimination in Income Security Programs*, 49 NOTRE DAME L. REV. 534 (1974).

Women's Law Forum

workforce spent raising children reduces average earnings. Some women find that the dependency benefits to which they are entitled exceed those earned in their own paid careers.¹⁸³ As long as childcare responsibilities cause women to have more zero years of earning than men, even the full elimination of job discrimination would result in lower benefits for women.

C. SUPPLEMENTAL SECURITY INCOME

Women who receive the minimum Social Security benefits, or none at all, may qualify for Supplemental Security Income (SSI).¹⁸⁴ Women comprise seventy-two percent of aged recipients¹⁸⁵ of SSI, and women over eighty years of age make up twenty-two percent of the aged caseload.¹⁸⁶ Widows in particular are forced to rely on SSI because while they may have accumulated modest assets, they often have no present income. The usual sources of income—pensions, social security, and earnings—are often unavailable. This lack of income forces many formerly middle-class older women to seek welfare benefits; and to meet eligibility requirements, many must liquidate and spend their accumulated assets.¹⁸⁷ As a consequence, these women must sometimes sacrifice stabilizing resources and are often reduced to actual poverty in order to qualify for income maintenance.

Once she becomes an SSI recipient, an older woman faces numerous rules which curtail her lifestyle options and potentially reduce her financial stability even further. For example, the holding-out rule¹⁸⁸ declares that a marriage relationship exists whenever a man and a woman live together and represent themselves to the community as married.¹⁸⁹ This regulation has

183. Sommers, *supra* note 112, at 7.

184. 42 U.S.C. §§ 1381-1383c (1976).

185. See note 9 *supra* and accompanying text.

186. Orshansky Address, *supra* note 136.

187. The SSI resources limitation restricts allowed assets to \$1500 in value. 20 C.F.R. § 416.1205 (1979). This sum includes all savings and checking accounts, cash, securities, gifts, burial savings, and war bonds. Certain assets are not counted in determining SSI eligibility. These include the family home, 42 U.S.C. § 1382b (a)(1) (1976); up to \$1500 worth of household goods, 20 C.F.R. § 416.1216 (b) (1979); and a car valued at \$1200 or less, 20 C.F.R. § 416.1218(b) (1979).

188. 42 U.S.C. § 1382c(d)(2) (1976).

189. To determine if a couple is holding out, the government uses the following information: how each is introduced to others, how mail is addressed, how contracts or tax returns describe them, and how they are named on their lease or mortgage. 20 C.F.R. §

a particularly negative impact on widows because the benefit amount for a couple is less than the combined amount received by two eligible individuals living separately. Having been conditioned to be dependent upon men all their lives, impoverished widows are penalized for that dependency at a time when they are most vulnerable to it.

Another provision, the six month rule, treats a separated couple as married for six months after the physical separation.¹⁹⁰ Because a couple receives a smaller benefit than two single individuals, each member receives only half of the reduced benefit until six months have passed from the date of separation.¹⁹¹ The six month rule particularly affects those women who, when they or their husband retire, hold few assets separately and thus have less access to supplemental income during the six month period.

A third provision is the requirement that benefits be reduced by one-third if the recipient lives with or accepts support from relatives.¹⁹² Women experience lifelong encouragement to rely on relatives but are penalized at this point for doing so. This provision focuses on family structure and living arrangements rather than on financial need, and acts as a strong disincentive to older women who wish to share a home with adult children or siblings. A similar provision terminates benefits if the recipient enters a medical institution for a month or longer,¹⁹³ ignoring the recipient's need for continued rent payments and other monthly bills.

Other provisions for SSI eligibility affect women because of arbitrary standards and mechanical application. The income and resource limitations¹⁹⁴ result in dollar-for-dollar reduction of benefits equal to any amount in excess of allowed levels.¹⁹⁵ This provision discourages saving, promotes discrimination against

416.1035(b) (1978). No other federal income maintenance program uses such a liberal and expansive definition of marriage.

190. 42 U.S.C. § 1382 (1976).

191. 20 C.F.R. § 416.1040(c) (1979).

192. 42 U.S.C. § 1382a(a)(2) (1976).

193. *Id.* § 1382(e).

194. 42 U.S.C. 1382a(a)(2) (1976).

195. 20 C.F.R. §§ 416.1130, 1138 (1979).

the frugal, and prevents any potential self-sufficiency.¹⁹⁶

A blatant example of discriminatory treatment accorded the aged is the lack of training or work programs associated with the SSI program. If older women receiving SSI wish to work, they must find employment for themselves and then face age and sex discrimination within the private sector. They receive none of the incentives accorded other SSI recipients. The cost of an approved plan to achieve self-support is deducted from the income of the blind and disabled recipients when calculating their SSI payments,¹⁹⁷ but is not deducted for aged SSI recipients. Similarly, work-related expenses are disregarded only for blind recipients.¹⁹⁸ Apparently, self-support is not deemed a worthy goal for aged SSI recipients even though experts on aging have long recognized the important relationship between work and self-esteem.¹⁹⁹

196. See the Bessie Heppner case, Decision of the Appeals Council of the Bureau of Hearings and Appeals, SSA, HEW (June 10, 1977), cited in SENIOR ADULTS LEGAL ASSISTANCE, AGING AND THE LAW CURRICULUM MATERIALS, Pt. III, SUPPLEMENTAL SECURITY INCOME 47 (1977) (available from Senior Adults Legal Assistance, 624 University Av., Palo Alto, CA. 94301), in which the SSI recipient had managed gradually to save an amount in excess of \$1500. The Appeals Council concluded that these savings constituted a resource to her and, therefore, she was no longer eligible for SSI due to excess resources. *Id.* at 49. For a detailed explanation of the SSI program in California, see COPPLEMAN & HESTAND, *THE SSI SYSTEM FOR CALIFORNIA'S AGED, BLIND, AND DISABLED: A TRAINING AND REFERENCE MANUAL* 48-62 (2d ed. 1977). For a discussion of needed reform of the income limitations in the SSI system, see Chang, *supra* note 132, at 314, 346-49 (1977).

197. 20 C.F.R. § 416.1171 (1979) provides:

Earned or unearned income which has not been excluded from consideration by § 416.1149 through § 416.1169 shall not be considered in determining countable income under § 416.1115 to the extent that such earned or unearned income is needed to fulfill an approved plan for self-support pursuant to § 416.1731 for an individual who is disabled or blind as provided by Subpart I of this part.

For a discussion of the relationship between the Social Security Act and SSI see Martin, *Public Assurance of An Adequate Minimum Income in Old Age: The Erratic Partnership Between Social Insurance and Public Assistance*, 64 CORNELL L. REV. 437 (1979).

198. 20 C.F.R. § 416.1169 (1979) provides:

Earned income not excluded from consideration by § 416.1149 through § 416.1167 for an individual who is blind as defined in Subpart I shall not be considered in determining countable income under § 416.1115 of this subpart to the extent that such income is used to meet any expenses reasonably attributable to the earning of any income.

199. For example, the National Council on Aging has a Division devoted to work related issues and publishes a quarterly periodical, AGING AND WORK. Similarly, the Cali-

For older women who fail to find employment in the private sector, publicly funded jobs are scarce and poorly paid.²⁰⁰ Further, the age and sex discrimination of the labor force is reflected in public work programs; the discrimination in CETA, for example, has been well-documented.²⁰¹

All of these factors mean that women have no escape from poverty—or from welfare. Women who have worked all their lives and tried to plan for their futures, find themselves caught unaware and unprepared by societal changes and the cumulative effect of sex discrimination in every social and economic sphere.

IV. CONCLUSION

The foregoing discussion describes the sex and age discrimination women suffer, and traces the poverty which results from that treatment. Women of all ages are vulnerable whether they work outside the home or as homemakers.

California Commission on Aging has an employment committee. The commission held state-wide hearings to document these issues; they are summarized in T. Sommers, *Obstacles and Opportunities for Employment of Older Persons in California* (1978) (published by the California Commission on Aging) (a free copy may be obtained by writing to the Commission at P.O. Box 350, Sacramento, CA. 95802).

200. For example, the eligibility requirements of the Senior Community Service Program limit participation to persons with an annual income below \$500 over 125% of the poverty level as established by the U.S. Office of Management and Budget. 29 C.F.R. § 89.19(b)(3)(11) (1979). Even so, the program offers only half-time employment, generally at minimum wage. 29 C.F.R. § 89.25(b)(1) (1979) provides that subsidized employment positions may not allow for more than 1300 hours of work annually (25 hours weekly).

201. See, e.g., U.S. COMM'N ON CIVIL RIGHTS, *AGE DISCRIMINATION STUDY*, PT. II (1979). "At age 45 the ratio of persons enrolled [in all CETA programs] to those unemployed declines sharply. Persons in each of the age groups over 44 are enrolled at less than half their proportion of the unemployed population." *Id.* at 134. See WOMEN'S WORK FORCE, *SHORTCHANGED AND SLIGHTED: AN ASSESSMENT OF THE DEPARTMENT OF LABOR'S NATIONAL RESPONSE TO WOMEN'S EMPLOYMENT AND TRAINING NEEDS* (1979), regarding tracking of women into traditional lower paid jobs and virtual exclusion of women from skilled trades. For a discussion of sex discrimination within CETA, see C. ESTRADA & E. NAVA, *CETA: AN ECONOMIC TOOL FOR WOMEN* (1979) (describing the investigation of sex and race discrimination by CETA in San Antonio, Texas) (available for \$1 from the Mexican American Legal Defense and Educational Fund, 28 Geary Street, 6th Floor, San Francisco, Calif. 94108); LEAGUE OF WOMEN VOTERS EDUCATIONAL FUND, *CETA MONITORING MEMO* (1978); *HOW TO TAME THE CETA BEAST*, *supra* note 164 (covering in particular the discrimination older women face); WOMEN'S WORK FORCE, *NEW CETA REGULATIONS: SOME IMPROVEMENT FOR WOMEN* (1979). The National Employment Law Project (NELP) in New York City provides a CETA Litigation Kit containing a summary of the 1978 amendments, model complaint and model interrogatories (available from NELP, 475 Riverside Dr., New York, N.Y. 10027).

Since far more women than men are in the poverty class, any program to "get people off welfare" will have to provide adequately paying careers for women workers and economic recognition of homemakers. Nevertheless, this reality is set against the backdrop of a receding economy.²⁰² Male workers, threatened with an expanding labor force in a declining job market, view women entering the labor force as a threat to employment of male breadwinners. Those attempting to improve the economic status of homemakers have faced similar obstacles. For example, efforts to obtain pension rights for the predominantly female spouses of civil service and military personnel, have met with organized resistance from male workers and servicemen.²⁰³

Concurrently, middle-income taxpayers are being pressured to finance expanding services as taxes take ever-larger chunks from their paychecks.²⁰⁴ Social welfare spending, whether for employment training or welfare, is criticized as inflationary.²⁰⁵ As a result, social welfare programs must compete with other national priorities such as military preparedness, inflation, and energy.

Any feminist analysis of current issues, however, must include a discussion of welfare and stress its importance as an issue affecting women. The victims of economic dependency are very much with us, and because only fifty percent of women are employed today,²⁰⁶ the dependency problem will not disappear soon. Furthermore, the fact that a woman may have a job provides no assurance that she will avoid welfare. For many women,

202. *Quickening Recession Signals*, BUSINESS WEEK, June 4, 1979, at 58; *Recession: How Deep, How Long?*, U.S. NEWS & WORLD REPORT, July 23, 1979, at 48; *Recession: Deeper and Longer*, TIME, Oct. 8, 1979, at 70.

203. One particularly active lobby is the Military Retirement Protection Association, based in San Antonio, Texas.

204. See, e.g., Lipset & Raab, *The Message of Proposition 13*, COMMENTARY, Sep. 1978, 42, 44-45, reporting a high percentage of Californians supporting cuts in welfare and public assistance programs due to Proposition 13. (Proposition 13 appeared on a statewide ballot in June 1979. Its passage required large cuts in property taxes, a major source of local and state revenues.) The authors note that this attitude has remained unchanged over the years.

205. See, e.g., Lewis, *Budget Victims of Recession*, BUSINESS WEEK, July 16, 1979, at 117 (discussing cutbacks in social welfare programs).

206. In June 1978, 48.8% of all women were employed. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE U.S., LABOR FORCE PARTICIPATION RATES 392 (1979).

welfare is the only buffer between themselves and destitution, and its inadequacy is a critical factor in their continuing poverty.

Women are caught in a system that provides neither full economic equality nor adequate support to those economically dependent. Women receive a lifetime of training for economic dependency, yet are penalized for learning their societal lessons well. The eradication of poverty will not be possible without addressing the link between women's continual destitution and their socialized role in a sexist society.